

INFORMATION

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ALEXANDER DONALDSON and JOHN WOOD,
Booksellers in EDINBURGH, and JAMES MEUROSE,
Bookseller in KILMARNOCK, Defenders;

A G A I N S T

JOHN HINTON, Bookseller in London, and ALEXANDER
M'CONOCHIE, Writer in Edinburgh, his Attorney, Pur-
suers.

January 2. 1773.

[Lord COALSTON Reporter.]

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ABOUT the year 1732 the reverend Mr. Thomas Stackhouse, vicar of Beenham, in the county of Berks, published a book, entitled, 'A new history of the holy Bible, from the beginning of the world to the establishment of Christianity, &c.'

A second edition of this work was published by Stephen Austin, bookseller in London, who obtained a patent from his Majesty in the following terms: 'George, &c. To all to whom these presents shall come, greeting: Whereas, our trusty and well-beloved Stephen Austin, of our city of London, bookseller, hath humbly represented unto us, that he is now printing a second edition of a work, entitled, *A new history of the holy Bible, from the beginning of the world to the establishment of Christianity, with answers to most of the controverted questions, discussions*

tions upon the most remarkable passages, and a connection of prophane
 history all along; to which are added, notes explaining difficult texts,
 rectifying mistranslations, and reconciling seeming contradictions; in
 two volumes in folio; compiled and written by our trusty and
 well-beloved Thomas Stackhouse, master of arts, and vicar of
 Beenham in our county of Berks: And whereas the said Ste-
 phen Austin has informed us, that the said work has been per-
 fected with great labour, study, and expence, and that the
 sole right and title of the copy of the said work (as now pu-
 blishing) is vested in him, he has therefore prayed us to grant
 unto him, the said Stephen Austin, our royal privilege and li-
 cence for the sole printing, publishing, and vending the said
 work for the term of fourteen years. We being graciously
 inclined to give encouragement to all works that may be of
 public use and benefit; and especially to those of this kind,
 which tend so much to the advancement of religion, and the
 general good of mankind, are pleased to condescend to his
 request, and do, by these presents. (as far as may be agreeable
 to the statute in that case made and provided) grant to the said Ste-
 phen Austin, his heirs, executors, administrators and assigns,
 our royal privilege and licence for the sole printing, publish-
 ing and vending the said work, during the term of fourteen years,
 to be computed from the date hereof, strictly prohibiting
 and forbidding all our subjects within our kingdoms, and
 dominions, to reprint or abridge the same, either in the like-
 or any other volume or volumes whatsoever, or to import, buy,
 vend, utter, or distribute any copies thereof reprinted beyond
 the seas, during the aforesaid term of fourteen years, without
 the consent or approbation of the said Stephen Austin, his
 heirs, executors, administrators, and assigns, by writing un-
 der his or their hands and seals first had and obtained, as they
 will answer the contrary at their peril: Whereof the commis-
 sioners and other officers of our customs, the master, wardens,
 and company of stationers of London, and all other officers
 and ministers whom it may concern, are to take notice that
 strict obedience be given to our pleasure herein signified.
 Given at our court of St. James's the eighth day of January
 1741-2, in the fifteenth year of our reign.

This second edition appeared about the year 1744.

Stephen

Stephen Austin executed a will, by which he appointed his wife to be his sole executrix, and bequeathed to her his estate real and personal.

Elizabeth, the widow of Austin, proved the will, and obtained administration of his effects.

Elizabeth afterwards married John Hinton, the pursuer, and is now deceased.

Mr. Stackhouse, the author, died in October 1752.

About the end of the year 1765 Mr. Meurose compleated an edition of Stackhouse's history in six volumes octavo, which he had frequently advertised in the newspapers for two years preceding; during which time he was employed in printing and publishing the work in volumes, without any challenge on the part of Mr. Hinton.

Mr. Meurose thinking there might possibly be less demand for that part of the work which related to the Old Testament than for the New-Testament part, kept the two separate, making indexes for each, and printing more copies of the latter than of the former. But afterwards finding, upon trial, that the whole book went off equally well, he agreed with Mr. Donaldson and Mr. Wood, to reprint and publish so many copies of the first four volumes, (being the Old-Testament part) as, joined to the copies remaining of the two last, would make compleat sets. This was done in 1767, when the book was advertised as formerly, and still no complaint made.

No earlier than 1770, Mr. Hinton without any previous notice, was pleased to bring this action before the Court of Session, concluding against the defenders for restitution and damages, on account of a supposed violation of his *property*; by printing and publishing said work. He did not pretend to lay his claim upon the patent, then confessedly at an end; or upon the statute of Queen Anne, which was likewise out of the question; but he endeavoured to maintain the conclusions of his action upon the footing of a *common law property* in authors, independent of statute, or of special grant.

The cause having come before Lord Coalston, Ordinary, the defenders moved an objection to the title; that, supposing the existence of such a right in authors and their heirs or assigns, the pursuer in this case had produced no sufficient evidence of his

his being either the heir or assignee of the author. To which it was answered, that the author having made over his copyright to Austin, the assignee, and Austin having conveyed his whole effects by testament in favour of his wife, the same passed *jure mariti* to Mr. Hinton, the second husband of Austin's widow; and consequently this property, if it did at all exist, was now in the pursuer. The Lord Ordinary was of this opinion, and the objection to the title having been over-ruled, his Lordship took the cause to report upon the merits, and ordered informations; in obedience to which, this is humbly offered for the defenders.

In general they are to maintain, That the law of this country acknowledges no perpetual monopoly in authors, or, in other words, no reserved exclusive right to their works after publication, such as hath of late been contended for, under the name of *literary property*.

The subject is copious, and has of late been much handled. The defenders would encroach greatly too far on the patience of your Lordships, were they to state every thing that has been wrote and said upon it. The plan which they propose, is,

I. To inquire into the nature of this species of property claimed by authors, or rather by booksellers; and to show, that it is not founded in the general principles of law; that it is not consonant to reason: and that neither the interest of society, the advantage of authors themselves, nor any consideration of expediency or police, are concerned in establishing such a property.

II. To examine how far it is a species of property acknowledged by the *common law of Scotland*, independent of special privilege and of the act of Queen Anne: Under which head, the defenders expect to satisfy your Lordships, that it is supported by no authorities or precedents with us; by no custom; by no circumstance tending to show that such a property ever existed in Scotland.

III. To consider the act of Queen Anne, with its effect upon this question.

IV. With great deference, to submit a few observations on the law of England, which is said to stand in favour of the exclusive right of authors.

V. Shortly

V. Shortly to bring under view those special circumstances of the present case, which may have an influence upon the question.

I. The assertors of *literary property* define it to be, ' A right which the author of any work has in the combination of ideas produced by himself, and of which his book is composed.' It is not merely a property in the manuscript, which is a tangible substance, capable of possession ; but they are pleased to figure something incorporeal and invisible, in which that sort of right, called *literary property*, consists. It is a right to the doctrine contained in the book ; to a set of ideas, or modes of thinking, communicated by words and sentences ; and which carries along with it the sole privilege and power of disposal even after publication.

This incorporeal right, detached from any physical existence, they express by the word *copy*, or *copy-right* ; and the benefit attending it when sold, they call *copy-money*. The technical terms here used, are of modern invention ; and when we enquire into the nature of the subject to which they are applied, we find nothing real in it, nothing to which the character of *property* can either in language or in reason be affixed.

A man who puts his thoughts into writing, or who prints them, may keep hold of the volumes, and call them his property : But this will not answer the purpose of those who contend for literary property, without supposing the *matter* of the book, or the ideas and composition, to be the foundation of another kind of property, independent of the materials ; and this property we must figure to be of such a nature, that it can subsist and be retained by a possession of the mind, after the subject of it is given away, and put under the power of others. Their position is, That though the author disposes of his edition, and makes his work patent and public to the whole world, he nevertheless reserves to himself a property in the *literary composition*, whereby he alone has the power of regulating all future publications, and of restraining others from transcribing or reprinting his work.

The smallest consideration will show, that the word *property* is here most erroneously used. If it be any thing at all, it is not a property, but a *monopoly*, or right of prohibiting others from doing what otherwise would be competent to them. Property

is defined to be, *jus in re*; and there can be no property without a subject or *corpus*, to which it refers. Neither the definitions of *property* given by Puffendorff, Grotius, and other writers, nor the modes of acquiring it, do at all apply to this metaphysical right which an author is supposed to have in his ideas after publication. Such a right is not capable of occupancy, of accession, of tradition; nor is it the object of any visible possession. Ideas, whether remaining in the mind, or expressed and published by word or writing, cannot be deemed *property* in a civil or legal sense. They are indeed *proper* to the person who conceived those ideas; but when they are called his *property*, it must be metaphorically, and not in a strict sense.

Besides, it has been well observed by writers on this subject, That all men whose sensations are equally well ordered, ought to have the same perceptions. It will be extremely difficult therefore to ascertain whose ideas they originally were, or to say that they are proper to one man more than to another. All that can be said of the matter is, That an ingenious and speculative man improves his intellectual powers more, and makes a better use of them than his neighbours. But this cannot come under the denomination of *property*, any more than the circumstance of one man's blood circulating faster than another's, or of being more expert in walking, riding, or fencing.

If by the word *property* is meant, That such a man is the *author* of such a work, *i. e.* that the work is the result of his labour and ingenuity, in arranging a set of ideas, putting them into writing, and causing them to be printed and published; all this may be very true, and so far the author may be said to be *proprietor*. But this is a definition which will be of no avail in the present question; it is merely a *metaphorical property*, and an abusive signification of the word.

It may likewise be admitted, without hurt to the argument, that by publication the author is not divested of this species of property. He still remains entitled to the character of *author*; he has a right to all the *fame* arising from that character; and if any person attempts to rob him of that fame, for example, by denying that he is the author; such person is guilty of an injury and liable to just censure; though whether even this offence would be actionable before a court of common

mon law, is far from being clear. A story is told of one Simon Marius, a German, residing at Padua, who having translated into Latin a book published the year before by Galilæo, caused his disciple Capra to print it as his own. Galilæo complained of this to the Reformers of the university of Padua, who very justly ordered Capra's book to be suppressed, and give satisfaction to Galilæo for the injury done him *against the laws of printing*. It is plain, that the offence here consisted in the attempt to rob the author of his fame, by printing the book under a false name; for as Marius was the translator of it, he had clearly a title to publish his translation, even according to the modern ideas of literary property, had he done it fairly, and published it as the work of Galilæo. It appears too, that the complaint was made, not to a court of common law; but to an extraordinary jurisdiction, erected for the purpose of regulating such matters, and of inquiring into literary frauds. Such literary thefts are committed every day, and are known by the names of *piracy* and *plagiarism*; however contrary to good manners, it may be doubted if they are cognizable in courts of common law.

But the present question is, Whether, after an author has published his work, he reserves a property in it, whereby he can restrain all other men from transcribing, printing, or multiplying copies of this work, which falls into their hands, no injury being done to his *character as author* of the work, which may afford him any personal ground of complaint? The question in short is, Whether he has a retained *property* in the words, sentiments, and composition, after having presented them to the public; or if, on the contrary, by the very act of publication, he does not make them common?

That he does make them common, and put it in the power of all mankind to copy, transcribe, and print them at pleasure, is, with submission, a self-evident proposition. He can have no hold of the sentiments which he has published; he throws them into the common stock; he quits the possession of his ideas, and allows every person to make of them what use he thinks proper. In certain cases, the law acknowledges a *possessio animi*; but here no such mental possession can be figured: For the very purpose of publication is, to communicate the possession to all mankind; and this is the natural and necessary consequence of the act.

• In vain (says Puffendorff) would we appropriate to ourselves
 • those things which others can enjoy without our conient,
 • and without our being in a condition to hinder them in any
 • shape.'

By publishing, whether *gratis* or for a valuable consideration, the author gives his sentiments and doctrine to the world at large ; and there are not *termini habiles* for supposing that he still retains a power and control over them. If a proprietor of land gives off a road to the public, he cannot afterwards obstruct that road, or hinder the public from using it. When an author is out of possession, by publishing his work, he cannot still have a *jus in re*, or such dominion over it as to limit the use of those who came lawfully into the possession of what he has published.

The pursuer says, ' That property in its just sense comprehends the interest of a party in any thing which is capable of ownership, whether corporeal or incorporeal, such as his life, his labour, or his fame, and that the common law means to secure to him whatever he has a just right to hold and enjoy, or whatever cannot be violated, consistently with the peace and happiness of mankind, and that every man's feelings can easily distinguish what falls under this idea.' It is further observed, ' that the definitions of property given by Grotius and other lawyers, are not adapted to the present state of society.'

But it is plain, that the descriptions of property here substituted, in place of those which have uniformly been adopted by lawyers, both antient and modern, are by much too lax and indefinite. In this way, every sort of right, whether real or otherwise, whether connected with a corporeal subject, or merely arising from contract, or founded in the state of persons, and in the duties which men owe to one another in society : All these, according to the pursuer's definition, must come under the idea of property ; so that if he has children, he may say that he has a property in the obedience which they owe him :—If he has a wife, the conjugal duties are his property :—If a certain privilege is given him by law, or by grant, of doing a particular thing, or of hindering others from doing it, this he may likewise call his property. In short, every right whatever may be brought

brought under this general denomination, and every legal and known distinction of terms must be given up, in order to answer the pursuer's hypothesis.

But after all, supposing his argument were founded in the propriety of language, and in the just signification of the words used by him, it would still remain to prove his right of *ownership*, which must mean an *exclusive* right, in a subject not under his power, *viz.* a literary composition, which he himself has communicated to all mankind by publication. He neither has the possession, nor enjoys the use of it, except in common with other men. How then can he exercise this pretended property, or upon what foundation does it rest?

The difficulties of a retained *ownership* in a published composition, are so great and so obvious, that the assertors of literary property have been driven to suppose, that there is some *implied contract* in the act of publication, by which it is understood, that only a limited use is conveyed, and that purchasers are not to multiply copies for their own benefit. But if there is such an implied contract in the nature of the transaction, it must be *ius gentium*, it ought to obtain every where, and we would have seen it established and enforced in all ages, at least since the invention of printing. On the contrary, no notice has ever been taken, either by lawyers or by authors, of any such contract; no action has ever been sued upon it; and at this day, it would sound very strange in the courts of France, Holland, or other countries, were an English author to sue for breach of contract on account of his works being republished there by persons who never had any contract with him.

When an author, or bookseller, sells a printed copy of his book, he does not stipulate with the purchaser that he shall only make this or that use of it; and, in particular, that he shall not transcribe, or multiply copies. No title-page ever bore, that the book was sold upon condition that the purchaser should not write or print it over again. No bargain of this kind ever was expressed, and none can be implied; as the purchase is made without any reservation; and it would be against the common principles of law, as well as public good, to limit the purchaser's right by implication. The diffusion of learning is a matter of general concern; and it might be a means of obstructing this, if

any person who has *bona fide* acquired as his own property either a written or printed copy of a book, might not transcribe, print and circulate such book at his pleasure. A prohibition to multiply copies can no more be *inferred*, than a prohibition to lend to a friend, or to keep a circulating library; by which, as well as by multiplying, the profits of the first publisher may be abridged.

The pursuer says, why should an author forfeit the right of printing his own work, by the first publication? and why should it be supposed, that when one purchases a printed copy of a book for a few shillings, he has thereby acquired the right of reprinting and selling that work? The answer has already been given. The author forfeits no right which he could possibly retain, and the purchaser of the book is entitled to benefit his labour upon it, either by copying, printing, or in any other shape he thinks proper, unless restrained by special authority; in the same way as the purchaser of a table or a chair is at liberty to make as many other tables or chairs exactly similar to it as he shall think fit, either for his own use, or for selling to others.

So far from being against the nature of the transaction, it is plain, that such multiplication is most agreeable to it; nay, is the very thing which every author must be supposed to have in view by the act of publication. For every author who brings forth his sentiments into the world, must be understood to mean, that those sentiments should be propagated; and therefore the person who is most assisting to him in this, by multiplying copies, is the person to whom the author is, or ought to be, most obliged. He does him the greatest of all favours, by distributing his work, and consequently spreading his fame. This is the true light in which the matter ought to be viewed by authors: For as to the paltry consideration of copy-money, (the late invention, not of authors, but of booksellers), it is plain, that whatever an author may be entitled to upon the first publication, he has no foundation in reason, or in the nature of the thing, to expect that this should be repeated, after the book is no longer under his power.

It was said, that a literary composition does certainly remain under the sole dominion of the author, till he thinks proper to publish

publish it; and if so, why should he lose this property by the act of publication?

The distinction is extremely obvious. Before publication, he has the manuscript in his pocket; he may exclude all others from seeing it, or may throw it into the fire. The manuscript is as much his property as a table, or a chair, or any moveable belonging to him. Of course the sentiments and doctrine, which are only to be found, either in his own head, or in the manuscript, must be under his power, being not communicated to others. Even after publication, the original writing may continue under his power; and any person who opens his cabinet, and takes it away, may be punished as a felon. But the author's dominion over the sentiments and composition is at an end by the publication; it could not in nature subsist any longer.

The author may avail himself as much as he pleases of the property of his manuscript; but it is denied that he has any *property* in the ideas thereby conveyed, further than that he could have retained them in his mind; or, when formed into a literary composition, could have shut up this in his cabinet; which no more constitutes him the *proprietor* of the composition, considering it as an intellectual conception, than a man can be said to be *proprietor* of a good thought, or of a witty saying. He is the *author* of it, but not the *proprietor*; and as soon as he divulges it to the world, he gives up his words and thoughts to the public; he cannot possibly recall them, nor can he hinder any person from repeating and spreading them at pleasure. It is inaccurate to say, that the author *loses* his property by publication. He only makes his ideas common; he delivers his composition to the public; and puts it in the power of every individual who gets this publication into his hand, to make any use of it he shall think proper. There is only one case in which it can be figured that an author retains the exclusive enjoyment of his ideas, after having published them, *viz.* if he writes in an unknown language, or character invented by himself, and which he alone can decypher. At the same time even there, supposing any person into whose hands the book has come, should take a fancy to reprint it, what power has the author to hinder him?

Allowing.

Allowing that the word *property* could, in the strictest sense, be applied to this sort of incorporeal essence called *composition*, where is the difficulty in supposing, that, before publication, this property remains with the author; and that, after publication, it becomes communicated to those who purchase his book? Take the case of a man who deals in horses, and who has a stud for the purpose of breeding. This man may keep the whole produce to himself, without sale or communication to any person; but if he chooses to do the contrary, is it not plain that every person who buys from him, must have the power of multiplying the breed, unless specially restrained by law, or paction? The same thing holds with regard to the inventor of a machine, the raiser of a new species of grain, the discoverer of a *nostrum*, or of any secret art. In all such cases, the act of publication must make an essential difference; and why it should not make the same difference in the article of books, the defenders cannot see. While the inventor retains his discovery to himself, or the author, his ideas, it is plain that none other can interfere in the use or practice of what is known to none but him; but when the secret is once discovered, and the ideas are published, every person is at liberty to take benefit from them, where no lawful impediment occurs.

It was said, That literary property was attended with the essential qualifications of other property; for that it was useful to mankind, and was capable of having its possession ascertained.

If by this it is meant, That the publishing books is useful to mankind, the defenders shall not dispute the proposition: But they cannot admit, that a reserved exclusive property after publication, would either be useful to mankind, or easily ascertained by possession.

If there be such a property, it is of all others the most whimsical: For it may be taken away entirely from the owner, by only adding a little to it, or improving it; for example, by republishing with notes, or translating it into another language, or making a few alterations here and there, still preserving the substance of the ideas.

Further: If it be a property, it is singular in this, that no creditor ever attached it, nor is it capable of being attached: For one of the great arguments used in favour of a reserved right in the author, is, That it is fit he should judge when to publish, and when

when not; that he should not only chuse the time, but the manner of the publication; how many and what volumes; what type; and to whose care he would trust the accuracy and neatness of the impression; in whose honesty he would confide, not to put in additions, &c. At this rate, it becomes a *res meræ facultatis* in the author, though he has once published his work, whether he will ever allow a second impression of it to be made or not. All these things he, or the person whom he trusts, must alone judge of: And therefore, though the argument supposes him to have a perpetual hereditary right in this literary composition, beneficial to himself, and exclusive of all others; yet it is a right which no creditor can lay his hand upon, because *inheret offibus* of the author, or the person to whom he gives it.

Suppose the author dies before publication, and the manuscript is found in his repositories, the *paper* may no doubt be considered as execrury; but how is the property in the *composition* to be disposed of? If this is to yield a perpetual revenue, or to be the subject of future profits at every publication, it ought by the law of Scotland to be accounted as *heritage*; so that here will be a question not easily resolved between heir and executor. And with respect to creditors, it may be asked, can they force the representatives of the author to publish and republish this work, in order to enlarge the fund for their payment? Can they arrest the ideas or adjudge them? Perhaps the author had no intention to publish this work; possibly it contains something criminal, or of a bad tendency, is it in the power of creditors, by attaching the manuscript, to publish it contrary to the will of his heirs, and thereby to bring infamy on the author's name and family? It may further be asked, whether the author's son, by publishing his father's manuscript, would subject himself in a passive title to creditors? These, and other difficulties, would result from establishing this imaginary property.

To say, That a literary composition is of common utility, and therefore susceptible of property, is quite inconclusive. Light and air are of common utility; and yet no person ever considered them as the subject of *property*.

A more plausible argument is, That an author is justly entitled to all the benefit arising from the labour of his mind; and that literary compositions being the produce of such labour, it is wrong to interfere with him in reaping the profits of it.

To this it is answered, in the *first* place, That the wrong here suggested, depends entirely on the extent and duration of the author's property; and it is the violation of that property that must alone constitute the injury. If his property be at an end, no injury is done him; and the question therefore returns, Whether, by the act of publication, the author himself did not make his work common? That this is the case, has already been shown; it is implied in the very word *publication*, and in the nature of the act itself.

2dly, It will be considered, that in order to give the extraordinary benefit here contended for to authors, the natural rights of others must be abridged. A person who copies or reprints a book which he acquired without any limitation, does no more than exercise a legal right; and however we may lean to literary merit, the property of other men is likewise entitled to protection. If the author himself has laid his work open, and has acquired all the fame arising from it, and even the profits of the publication, can he complain of the natural consequences of publication? He may, if he pleases, republish, and reprint his work; but he has also put it in the power of others to do the same; and this being his own act and deed, he cannot say that he is injured.

3dly, Though it may be true, that the labour and services of an author often merit pecuniary reward as well as reputation, the question is, Whether this ought to be infinite, and without end; or if the advantages attending a first publication, are not, for the most part, fully adequate to the purpose; and if it would not be highly detrimental to the public, were not some bounds set to this supposed equitable claim? The man of genius and study ought, no doubt, to have suitable encouragement; but this must be limited by the general good, and by a proper attention to the rights of others.

That an author should have the sole disposal of his original manuscript, and should enjoy the profit which naturally attends the act of making it public, is certainly most reasonable. Accordingly, every author has this in his power; and it is impossible to dispute it with him, because he may refuse to make it public, and may destroy his manuscript; if not previously insured of a suitable encouragement. Sir Walter Raleigh destroyed the manuscript

nuscript of the second volume of his history, because his book-seller told him he had lost upon the first ; and every author may do the same.

If he chooses to publish his work, he has the further advantage accruing from the *reputation* of it, which may often be considerable, even in a pecuniary view. A physician writing ably upon his profession, may advance his reputation, and consequently his practice ; a lawyer may do the same ; and even those who apply themselves to history, to poetry, or to *belles lettres*, have generally met with patronage and support from rich and powerful men, according to the merit of their works. This was of old, and this ought still to be, the true idea of an author's profit ; and it is an idea far superior to the modern invention of *copy-money* : An invention which has tended much to degrade the author's character, and to render him subservient to book-sellers and printers.

At the same time, the author may likewise, if he pleases, have his *copy-money*, if by this is meant the immediate pecuniary profits arising from the act of making his book public. Nay, he may have a great deal more. He may, by the established practice in this and all other countries in Europe, have a special *exclusive privilege* for a certain limited time, which will secure him in reasonable profits, if the work is entitled to any. The only question is, Whether he should not only have these advantages, but something farther ? Whether he should have a renewal of *copy-money* upon every subsequent publication without end, although, by the first act of publication, he has put the book, *i. e.* the sentiments and composition, entirely out of his power, and communicated them to the public ? Or, in other words, Whether, at the same time that he publishes his book, he is understood not to have made it public, but reserved to himself an exclusive possession and power over it. A little attention will show, in the first place, That it is impossible to give way to such contradictions. 2dly, That it would be no advantage to authors to go into them.

Indeed it is remarkable, that the claim of literary property has scarce ever been insisted in by *authors* ; and is almost confined to a particular society, even of *booksellers*, *viz.* those of London. At the same time, it is a question in which regularly the booksellers ought to have no concern : For when a bookseller purchases any work

work from an author, he can adapt his price to the extent of the benefit which he acquires ; and he can no more complain that the monopoly is not perpetual, than a person, who takes the lease of a farm, can complain, that his lease is only to endure for a certain period.

Besides: It is well known, that every book or manuscript is purchased upon the presumption, that there will be an immediate call for it. Few booksellers can afford to sink their money, even for certain returns, if they are very distant, much less would the uncertain chance that a book will continue saleable for ever, although the perpetual monopoly were fixed, go any great length in enhancing the price. No bookseller ever purchases a book, without calculating that he is to be indemnified, and to have profit upon the first, or at furthest the second edition ; and every person conversant in this matter knows, that the London booksellers give an author very little more for the absolute disposal of the manuscript, than for one large impression. Neither would they give more for a perpetual right, were it to be ascertained, than for the terms allowed by the statute of Queen Anne.

The establishing a perpetual monopoly, therefore, would be of no benefit to authors ; and it is plain, that booksellers have no pretence of claim to such a monopoly. Their profits have always been much beyond those of an author ; and it would not only be against justice, but most detrimental to the public, to extend their advantages any farther. One consequence would be, that the bookseller, being freed from all rivals in the price, paper, correctness, or any other part of the good execution of the work, would think himself at liberty to serve the public in all these respects as he chooseth. The execution would therefore be inferior, and the price very high. In this last article, the London booksellers have of late gone to a most extravagant pitch. In every kind of commerce, and in every art, there ought to be a competition. Without this, industry will not prosper ; and any monopoly or restraint must nourish tyrants, to oppress the country, and to annihilate ingenuity. The more useful any invention is, the more grievous the monopoly must be.

Besides, it was well observed by a late honourable person in England, ‘ That he could never entertain so disgraceful an opinion of learned men, as to imagine, that nothing would induce them to write, but an absolute perpetual monopoly : That he could

‘ not

“ not believe they had no benevolence to mankind ; no honourable ambition of fame ; no incitement to communicate their knowledge to others ; but the most avaricious and mercenary motives. From authors so very illiberal, the public would hardly receive much benefit.”

Another effect of making books a monopoly would be to enrich a few booksellers, at the expence of the whole nation ; a consequence already too much felt from the temporary exclusive privileges by patent, and from the act of Queen Anne. The defenders have been assured, that the booksellers in London have by ways and means engrossed, or attempted to engross, many of the most valuable books, both ancient and modern, under the specious colour of having purchased the copy-rights from the authors either immediately or by progress ; and that, when new works are produced, especially in Scotland, they combine together to put a negative on the sale of them, if they are not placed under their immediate protection. One instance of this was Mr. Hume’s History, Vol. I. It is even asserted as a fact, That in the year 1759, they entered into articles of agreement, and bound themselves under severe penalties, not to keep in their shops any English books whatever that had been reprinted in Scotland : That they raised a large subscription for employing persons to search for such books, and for prosecuting those who should transgress their resolution ; and also wrote circular letters, threatening the country booksellers, if they dealt in Scots editions : That, in other words, the London booksellers claimed to themselves, and resolved to assert, the sole privilege of printing and publishing all English books.

The consequences to the public, and particularly to Scotland, are extremely injurious. Instances could be given of publications, even of works composed by Scotchmen, which ought to have been sold at one-fourth of the price put on them by the London booksellers. This is a serious matter to the country, and will soon prove so to authors themselves, if the book-trade is carried on by a few hands, who will be enabled to dictate their own terms.

Milton’s Paradise Lost was sold by the author to a bookseller in London for 15 l. Sterling, the notion of perpetual copy-right not having then taken place. From this circumstance of being originally published by a London bookseller, the gentlemen of

that profession, now in London, draw an inference of perpetual exclusive right to themselves in this book, which has already produced to them many thousands of pounds ; and, if the doctrine of literary property were to be established according to their ideas of it, there is hardly a book extant in the English language, which might not in the same way be claimed by them. The trade of printing, bookselling, and paper-making, would in effect be knocked up in every part of the island, except London ; for the most of the capital books being first published in London, the whole business would be there carried on.

The right of suppression, is another dangerous though necessary consequence of the doctrine of literary property.—Suppose the heirs of Napier of Merchiston should insist to deprive mankind of the use of the logarithms invented by their predecessor, and on which navigation so greatly depends, would not such an attempt be alarming to society? Yet the author and his heirs are said to be the only judges of this. A person mischievously inclined might buy up copy-rights, in order to suppress them.

Let it be supposed, that the pretended copy-rights of Milton, Shakespear, Locke, Newton, and all the best authors presently claimed by the London booksellers, should happen in the course of time to be brought to sale, and purchased perhaps by a bookseller in Aberdeen, or in the Orkneys, who, in consequence of their own doctrine, would for the future have the sole regulation and disposal of these works, it may be asked, would the London booksellers trust to the Aberdeen or Orkney bookseller for supplying the English market? It would certainly appear hard to every Englishman, to see his country deprived of the right of printing her best authors. It would be said, that these great men did not write merely to get a little pittance to themselves or their families, but to enlighten mankind ; and that the race of booksellers, after being indemnified a hundred times over, had no right to deprive their country, or prevent the public, from having the full benefit of such useful works ; that England had the best right to possess and enjoy the writings of those great men to whom she had given birth, education, and protection, and was not for ever to be at the mercy of a Scotch bookseller.

Besides : The establishment of such a perpetual monopoly, would be attended with endless confusion and litigation among authors and booksellers themselves. The work of the mind, or what

what is called the *doctrine*, is said to be the foundation of the author's claim of property. Now, if this be the criterion, many will be found who have no pretence of right, and yet whose works are very useful to the public. In the first place, All editors who only publish the works of others, cannot plead this title. Then, all authors who give us nothing new, are in the same situation. The follower of any ancient or modern sect of philosophy, who only utters the doctrine of his master, cannot be said to publish his own ideas, or to furnish any original composition. A translator does not add a single idea. The publisher of a newspaper only transcribes. The compiler of a dictionary, of a grammar, or of the rudiments of a language, will generally be much in the same state.

It may often happen too, that different authors, writing upon the same subject, have the same reasonings. Can the author who publishes first on that subject, exclude all others from using the same set of words or ideas? Certainly he cannot. Suppose two different men compose tables of interest; if both their calculations are exact, they must, according to the rules of arithmetic, turn out to be the same. This observation will apply to most kinds of tables or calculations, as on life-annuities, logarithms, almanacks, &c If the first publishers of any such works were to have a perpetual monopoly, how absurd would such a position be, and how unjust to the rest of mankind!

Further: If this idea of property, in compositions of the mind, is at all gone into, it is difficult to see where we are to stop. The author of a song, or of a piece of music; the person who makes a speech in public, or who whistles a tune, will have the same property in his composition, and may equally insist in lawsuits against every one who pretends to borrow from, or to repeat after him. A lawyer may be prosecuted for copying authorities, and for taking arguments from the suggestion of others; yet he would not otherwise do justice to his cause.

It is entertaining however to observe, what shifts the English booksellers and publishers fall upon, to evade their own doctrine. They suppose an author's works to be part of his estate, transmissible to his heirs and assigns for ever; yet any third person, unconnected with the author, and deriving no right from him, may lay hold of this property, and transfer it to himself, by only making a few insignificant criticisms, in the form of notes;

or

or, perhaps correcting the text, by the addition of some words and commas. *Shakespear's works* have been published by a number of persons in England; by Mr. Rowe, Mr. Pope, Mr. Theobald, Sir Thomas Hanmer, Mr. Samuel Johnson, &c. and if we can believe what these critics say of one another, their alterations are oftener for the worse than the better*; yet, bad as they are, they carry along with them a property in the book thus manufactured, and each critic becomes proprietor of a work which he never was capable of writing. In this way, not only the works of Shakespear, but those of Spenser, Ben Johnson, Butler, Milton, &c. have been appropriated by different commentators.

* 'Mr. Rowe (says Dr. Warburton) was so utterly unacquainted with the whole business of criticism; that he did not even collate or consult the first editions of the work he undertook to publish.' The same character is given of Mr. Rowe's edition by Theobald. And Johnson says, "Mr. Rowe seems to have thought very little on correction or explanation, but that our author's works might appear like those of his fraternity, with the appendages of a life, and recommedatory preface."

"Mr. Pope (says Theobald) pretended to have collated the old copies, and yet seldom has corrected the text, but to its injury."—"I know not (says Johnson) why Mr. Pope is commended by Dr. Warburton for distinguishing the genuine from the spurious plays. In this choice, he exerted no judgment of his own; the plays which he received, were given by Hemings and Condell, the first editors."

"Mr. Theobald (says Dr. Warburton), wanted sufficient knowledge of the progress and various stages of the English tongue, as well as acquaintance with the peculiarity of Shakespear's language; to understand what was right; nor had he either common judgment to see, or critical sagacity to amend, what was manifestly faulty; hence he generally exerts his conjectural talent in the wrong place."—"Theobald (says Johnson) was a man of narrow comprehension, and small acquisitions, with no intrinsic splendor of genius; with little of the artificial light of learning, but zealous for minute accuracy. In his reports of copies and editions, he is not to be trusted without examination. I have sometimes adopted his restoration of a comma, without inserting the panegyric in which he celebrated himself for his achievement."

"Sir Thomas Hanmer (says Warburton) was absolutely ignorant of the art of criticism, as well as the poetry of that time, and the language of his author: And so far from having thought of examining the first editions, that he even neglected to compare Mr. Pope's, from which he printed his own, with Mr. Theobald's." In another passage, he says, "Theobald and Sir Thomas Hanmer have left their author in ten times a worse condition than they found him."—"Sir Thomas Hanmer (says Mr. Dodd) proceeds in the most unjustifiable method, foisting into his text, a thousand idle alterations."

This critic, Mr. Dodd, is somewhat severe in his remarks. He says, "Mr. Warburton's conduct can never be justified, for inserting every fancy of his own in the text, when I dare venture to say, his better and cooler judgment must condemn the greatest part of them.—That there are good notes in his edition of Shakespear, I never did deny; but as he has had the plundering of two dead men (Theobald and Hanmer), it will be difficult to know which are his own. Some of them, I suppose, may be; and hard indeed would be his luck, if, among so many bold throws, he should never have a winning cast. But I do insist, that there are great numbers of such shameful blunders, as disparage the rest if they do not discredit his title to them?"—See also a pamphlet entitled, *The Contested Letter of Sir Thomas Hanmer*, printed at London in 1763.

Even some of the antient classic authors have been laid hold of, and divided into shares among the London booksellers. If the doctrine of literary property is established in Scotland, the booksellers and printers here must fall upon some device of the same nature, as they have no other method of employing themselves, except printing law-papers to the Court of Session, and reprinting and publishing books which have formerly been published in London and elsewhere; in doing which last, they imagine they are lawfully employed, while they do not encroach on the statutory or special privileges of others.

An argument used for literary property, is, That when an author has bestowed much time and labour in composing, and perhaps expended all his stock of money in printing and publishing an useful work, it is unfair and unjust that another should step in, the very next day after the work is published, and by purchasing a single copy, forthwith set about a cheaper edition, by which the profits of the author are intercepted, and even a loss brought upon him. That the edition thus published may be shamefully incorrect, and the author is also thereby deprived of the power of retracting errors, or making necessary additions; that the author has evidently a title in justice to prevent these things; and where there is a wrong, there ought to be a remedy in common law.

But the case here supposed, does, in fact, very seldom, if ever, happen. No bookseller or printer will be so unwise as to republish the works of a living author without his consent, with a view to intercept his profits; because it is in the author's power to retaliate the injury, by immediately correcting and altering his work, and by publishing it in a new form. Instances could be given of authors who have actually followed this course, in order to prevent others from interfering with them. Thus it is a known fact, that *Mair* published seven or eight editions of his *Book-keeping*, all of them different from one another; and the same thing has been alledged of a more celebrated writer, *Voltaire*. Neither will any person ever knowingly print an incorrect edition, which will not sell when a better one can be had. If the author's edition be incorrect, nothing hinders him to publish another, and to retract errors, or make additions, but he can never recall the copies he has once published and sold.

Besides : The argument, when attended to, will appear to be inconclusive. It is, no doubt, ungenerous to interfere with an author upon his first publication ; but it is such a wrong as can only be remedied by *special interposition*. And accordingly, to prevent this very abuse, the practice has been, here, and in other countries, to give exclusive privileges to authors for a definite time, in the same way as to the inventors of machines, or of any other art.

The poor have an equitable title to demand their maintenance from the rich ; but it never was imagined, that, independent of any statute, they could bring actions before courts of law or equity, for establishing rates upon the rich, sufficient to subsist them. Courts of justice can only interpose to make *perfect* rights effectual, not *imperfect* ones, such as that just now mentioned, and many others, arising from the obligations of friendship, gratitude, and benevolence.

The author of a book is precisely on the same footing, in this respect, with the inventor of a machine, or art useful in life. It is equitable that he should have the exclusive right of selling his work, for such a length of time as to reimburse him of the expence, and recompense him for his trouble ; but it by no means follows, that this right can be enforced by legal process. He has always the advantage of priority of sale ; and if others have an opportunity of following him, this is the necessary consequence of publication. It requires legislative power to restrain the natural rights of others.

The maintainers of literary property, finding it necessary to admit that the inventors of machines have no such exclusive right, have been at great pains to distinguish between the case of machines, and that of books : But, with submission, their distinctions are inconclusive and unintelligible. A book is a combination of ideas, so is a machine ; both of them are the result of invention : Why then should not the authors of both be equally entitled to make a trade of communicating this invention to the public ? It is either wrong to interfere with either, or it is lawful to interfere with both.

It is said, ‘ That a machine or utensil is the work of the hand, not of the mind ; and that property in the work of the hand is confined to the individual thing made, which if the proprietor thinks not fit to hide, others may make the like in imitation

imitation of it, and thereby acquire the same property in their manual work, which he hath done in his. But in the case of a production of the mind, the property consists in the doctrine produced, which the owner ought to have the sole right of transcribing and copying for gain.'

This argument is founded on a proposition not true in fact, That a machine is solely the work of the hand. The hand is no doubt necessary to put it into form, in the same way as in the case of a book : But surely it will not be denied, that the microcosm was the result of long labour and ingenuity of the mind ; that Mr. Harrison's time-piece is in the same case ; and that every species of mechanical work is more or less so. The author of a machine certainly uses his mind as much as the author of a book ; and the copier of a book uses his hand as much as the copier of a machine.

It is next said, That ' in the case of an utensil made, the principal expence is in the materials employed, which whoe- ever furnishes, acquires a property in the thing made, though by imitation : On the contrary, in a book composed, the principal expence is in the form given, which, as the original maker only can supply, it is but reasonable, how greatly soever the copies of his work may be multiplied, that they be multiplied to his own exclusive profit.'

This argument is far from being intelligible ; and it seems also to be founded on a mistake, that in the case of valuable machines, such as orreries, telescopes, time-pieces, &c. the chief expence consists in the materials furnished. In most books, the charge of printing the impression, is much more than the copy-money, often ten times as much.

It is unnecessary to go through the other arguments which have been suggested, for showing a difference between a book and a machine. They are all of the same stamp, all founded on *data* which at first sight must appear to be erroneous, or on distinctions too nice and subtle to be perceived by common eyes. There is no real difference with respect to the question of property, between a mechanical invention, and a literary one. The *inventor*, as well as the *author*, has a right to determine, whether the world shall see his production or not ; but if he once makes it *public*, every acquirer has a right to make what use of it he pleases. If the *inventor*.

ventor has no patent, his instrument may be copied: If the author has no patent, his book may be multiplied.

A printer of linen cloth, who devises new and elegant patterns, does not essentially differ from an author of books. An engraver of prints, who improves the art, and discovers something ingenious and new, is likewise in the same case; yet it never was thought, that either in the one instance or the other, there was any ground in law upon which copying could be hindered. It required a special act of Parliament to secure engravers in a *temporary* exclusive privilege, as in the sequel will be shown. The reason is plain; because stamping and engraving, as well as printing books, are lawful employments, which every one may exercise, unless forbid by special authority.

Besides the inconveniences already noticed, another difficulty which would follow the doctrine of inherent literary property, is, That it is attended with no marks by which the property can be denoted. The most strenuous assertors of this property admit, That a work may be abandoned to the public, in such manner as to leave no property in the author; and that this will be the case, 'if he stamps no mark of ownership upon it.' But they say, That if he sells for gain, or if his name be on the title-page, these are indications of property, which show his intention to preserve his right.

This is, in effect, retracting the admission: For few books are published without bringing gain; and, for the most part, also, the author's name is upon the title-page, which is only expressive of a fact, that he was the composer of the book; but does not inform the public, whether he is to claim a perpetual property in this work, or to make a free offering of it for the use of mankind. Third parties have no access to know what bargain there was between the author and the bookseller, or whether any price was paid to the former by the latter. When a temporary right was ascertained to authors by the act of Queen Anne, the legislature saw the necessity of establishing some *ouvert* evidence of the author's intention, and provided for it; but upon the footing of the common-law right, a person may offend without having any possible means of knowing whether he does right or wrong.

Upon these grounds, the defender is advised, that the perpetual right, supposed to be in authors and their heirs and assigns, which

which has received the name of *literary property*, rests upon no general principle of law, reason, or expediency. The next question is, How far there are any traces of it in the law of Scotland, prior to and independent of the act of Queen Anne?

II. If this species of property be at all a branch of the municipal law of Scotland, it must be founded either in the civil law, or in our own ancient customs, acts of the legislature, authorities of our lawyers, or judicial determinations of our Courts. All of these sources have been investigated; every corner has been searched; but not the least glimpse discovered of literary exclusion, independent of special grant: On the contrary, we find ample materials to show, that it is adverse to every notion of the common law of this country.

II Common
Law of
Scotland.

Before the invention of printing, the idea of property in an author, in the sense now contended for, could hardly exist; because the multiplication of copies by writing was so tedious, that it could yield no gain to the author, whatever it might do to those who endeavoured to procure a subsistence by their manual labour. This, in the Roman and Grecian states, was generally the task of slaves; and it was common for learned men, or those who were fond of making libraries, to keep slaves for the purpose of transcribing. This, in particular, was the case of Atticus, ^{C. Nepos Vit.} ^{ta Attici.} who made a large collection of very valuable books by means of his slaves, at no other expence than that of copying; and it does not appear that by so doing he gave any offence either to authors or to booksellers.

The only literary property acknowledged in the civil law, was that which was in the owner of the paper, or parchment, on which the words were wrote. ‘ Literæ quoque, licet aureæ sint, perinde chartis membranis cedunt; ac solo cedere solent ea, quæ inedificantur, aut inseruntur. Ideoque si in chartis membranis tuis carmen, vel historiam, vel orationem Titius scriperet; hujus corporis non Titius, sed tu dominus esse videris. Sed si a Titio petes tuos libros, tuasve membranas, nec impensas scripturæ, solvere paratus sis; poterit se Titius defendere per exceptionem doli mali, utique si earum chartarum membranarumve possessionem bona fide nactus est.’ *Inst. de rerum divisione*, § 33.

A late author takes notice of this text, and says, ‘ We find no Mr. Black-
stone, b. 2.
other mention in the civil law of any property in the works of c. 26. § 8. the

‘ the understanding, though the sale of literary copies for the purposes of recital or multiplication, is certainly as ancient as the times of Terence, Martial, and Statius.’ The latter part of this proposition, if it means that such copies were sold with an *exclusive* power of multiplication, is not supported by the authorities referred to.

Thus, in the prologue to the *Eunuch*, Terence says, ‘ *Hanc fabulam postquam ediles emerunt.*’ This only shows, that the public magistrate superintended the amusements of the theatre, and gave the dramatic poet a price for his work : It does not prove, that there was a trade subsisting between the bookseller and the author upon the footing of perpetual copy-right.

In the same way, the epigrams referred to in Martial, serve only to evince, that there was a bookseller, or copyist, who made it his trade to transcribe manuscripts and sell them, and who no doubt was paid for his trouble.

Sunt quidem, qui me dicunt non esse poetam ;

Sed qui me vendit bibliopola, putat. MART. l. 14. ep. 194.

The passage relative to Statius, in the seventh satire of Juvenal, is equally inconclusive, as it only proves, that Statius disposed of his tragedy to the players.

The following lines of Horace show very plainly, that there was no such thing as copy-right among the Romans.

Hic meret æra liber Sosii, hic et mare transit,

Et longum noto scriptori prorogat ævum. De art. poet. v. 345.

In the preceding verses the book is described, which is here spoke of, as procuring *money* to the *Sosii*, two brothers of that name, eminent booksellers in Rome ; and to the *author, fame*. This contrast between the author and the bookseller is remarkable : It shows Horace’s sense of the matter ; and that the notion of profit to an author, by perpetual sale of his works, was not then entertained.

Neither do the writers on the civil law take the least notice of a property in literary compositions ; though Voet, in treating of *privilegia*, makes mention of the exclusive *patents* sometimes given to printers of books.

The idea therefore of literary property could not creep in among us from the civil law ; and as little can it be traced to

any other source. It is said by *Ames*, in the preface to his *Typographical Antiquities*, ' That in the time of Henry II. of England, ' the manner of publishing the works of authors, was to have ' them read over for three days successively before the University, or other judges appointed by the public; and if they met with approbation, copies of them were then permitted to be taken, which were usually done by monks, scribes, illuminors, ' and readers trained up to that purpose for their maintenance.'

At this period, surely authors could have no monopoly after publication, either in Scotland or England. Every person who chose to be at the labour of transcribing, must have been entitled to ~~reap~~ the fruit of his labour; and as our common law goes back that length, so it follows, that literary property is no original part of the common law of this country. Public utility, as well as the nature of the thing, must have rejected any such pretence; and if so, it will be difficult to explain how, or at what time, or for what good reason, it should afterwards have been introduced among us.

Upon the revival of learning, and after printing had been invented, the publication of books was still an expensive operation, and could not be attended with profit to the author; but the zeal of learned men was great, and they published their works not only without reward, but at great private expence. The art of printing was introduced into England by Caxton about 1471, and into Scotland at or soon after the same time, as appears from *Ames*, and from *Watson's History of Printing*. When introduced, it was considered as a mechanic business, a manufacture of the kingdom, which all men had a right at common law to exercise: It was only a more expeditious method of copying. The first printers, both in England and Scotland, considered it in this light, and printed every book that came in their way, without any notion of being restrained, either by literary property, or by any other consideration.

The only method taken in those days to prevent interference was to conceal their art as far as possible, not being metaphysicians enough to imagine, that, by inventing the art, they had acquired any exclusive right to exercise it. ' Inventores primos id clam habuisse, omnesque secreti consciens, religione etiam jurisjurandi interposita, exclusisse; ideoque vastæ molis opera per paucis operariis fuisse concredita.' In spite of their endeavours

Maitaire,
Annal Ty-
pogr. I. p..

vours however, the art spread, printers multiplied, and books were published without any controll, till the policy of different states restrained it by positive regulations, or the prerogative of the prince, in arbitrary times, encroached upon the natural liberty of the subject.

The invention therefore of printing wrought no alteration to make the common law adopt new principles.

The liberty of the press in Scotland was first restrained by the statute of Queen Mary, 1551, cap. 27. which, upon the narrative, ‘ That diverse prenters in the realme prented *buikes* concerning the *faith*, ballates, fanges, blasphemationes, &c. to the defama- ‘ tion and slander of the lieges,’ therefore statutes and ordains, ‘ That na prenter presume, attempt, or take upon hande, to ‘ prent *ony buikes*, ballates, fanges, blasphemationes, rimes, or tra- ‘ gedies, outher in Latine or English toun, in ony times to ‘ cum, unto the time the samin be seene, viewed, and examined ‘ be some wise and discreit persons, depute thereto be the Ordin- ‘ nares quhat-sum-ever ; and thereafter ane licence had and ob- ‘ tained fra our Soveraine Ladie and the Lord Governour, for ‘ imprenting of sik buikes, under the paine of confiscacon of all ‘ the prenter’s guedes, and banisfling him of the realme for ever.’ This was entirely agreeable to the spirit of the established religion in those times, averse to free enquiry, and having no other means left of opposing the reformation than by obstructing the progress of knowledge and true literature, then fast gaining ground by means of the invention of printing.

Sir George Mackenzie, in his observations on this act, maintains, That printing is *inter regalia*, and that the King may discharge any man to print without his licence. At the same time he owns, ‘ It is the opinion of some republicans, that, printing ‘ being a trade, no man can be debarred from the free use of it, ‘ except by Parliament, in which their own consent is implied.’ It is immaterial to the present argument, whether the power of restraining the press was in this country acknowledged to be in the Sovereign, or in Parliament ; for still these restraints were of a very different kind from that of literary property, of which neither the legislature at the time, nor our lawyers, appear to have had the smallest conception. The *act above recited* strikes against *authors* as much as against others, and, paying no regard to *literary property*, prohibits them from even publishing *their*

their own works without licence.

Prior to the aforesaid act, 1551, there appears one in James the Fifth's reign, 1540, cap. 127. ordaining the acts of Parliament to be published, and the clerk-register 'to make ane authentic extract and copy of all the saidis acts, sa far as concernis the common weill, under his subscription manual, to be imprented, be quhat prenter it fall please the said clerke of register to chuse: And it shall not be leasum to ony uther prenter, to imprent the samin within this realme, or without the samin, or bring hame to bee saulde, for the space of sex zeirs next to cum, under the paine of confiscation of the samin: Providing alwaies, That the said prenter to be chosen be the said clerke of register, as said is, have our said Sovereigne Lordis special licence thereto.' Accordingly, in the same year 1540, we find a patent granted by the King to Thomas Davidson, for printing the acts of Parliament, and discharging all others for the space of six years, under the pain of confiscation; and there are sundry renewals of those licences to print the acts from time to time.

But this can hardly be accounted a restriction of the liberty of the press, as it was thought proper very early, both in England and Scotland, that acts of Parliament, and other acts of State, should be published under the direction of the King or his officers, and likewise *Bibles*; and in England, *Prayer-books*, and *Almanacks*, regulating the fasts and festivals of the church. These, in our neighbouring country, are called *prerogative copies*, having been vested in the supreme Magistrate from political considerations, for the sake of uniformity in law and national religion: They had no connection either with the supposed private right of authors, or with the general restriction of the press. At the same time it may be noticed with regard to the above act 1540, that the exclusive privilege, even of printing the acts of Parliament, was limited to six years, and that the authority of Parliament was thought necessary to confer this monopoly.

It is probable, that the establishment of the Reformation soon rendered the act 1551 unpopular, so far as regarded a general prohibition of printing without licence: But the ideas of prerogative at that time were high, and a custom had been introduced in other parts of Europe, of applying to the sovereign

for *privilegia*, or exclusive patents, of printing and publishing for a term of years. This took its rise in the more absolute governments of Europe, where the printers having been at great expence in searching out ancient authors, collating the manuscripts, and printing them, and being justly entitled to encouragement for so doing, applied to particular Princes for such *privilegia*, within their dominions; and it was no uncommon thing to obtain them from several potentates at once, e. g. the Emperor, the King of France, the Pope, and other Italian States *. Such privileges were in a great measure necessary, in order to bring these excellent authors from rubbish and obscurity: And as the work was attended with great expence, it was but fair to allow those who performed it to be indemnified; and even, by the prospect of gain, to be encouraged. It deserves, however, to be remarked, that these *privilegia* never were perpetual, but always granted for a limited term of years; sometimes seven, sometimes ten, and seldom, if ever, exceeding twenty years.

In Scotland, the first books were printed without either licence or exclusive privilege, generally at the expence of some rich or learned man, who had no profit from the work, but the satisfaction of doing good. The first printed book which we have in Scotland, is a Breviary of the church of Aberdeen, *pro Hyemali Parte*, said to have been printed in 1509. The only remaining copy of it is in the Advocates Library; and as it wants the beginning and end, the manner in which it was printed does not appear: But the next is a continuation, or second volume, of the same Breviary, called, the 'Pars Æstivalis, cum diversorum sanctorum Legendis, &c. per reverendum in Christo patrem, Wilelum, Abirdonen, episcopum studiosius, maxime misque cum laboribus collectis, non solum ad ecclesiæ suæ Abirdonen, verum etiam ad totius ecclesiæ Scoticanæ usum per celebrem Oppido Edinburgensi impresso, jussu et impensis honorabilis viri Walteri Chapman, ejusdem oppidi mercatoris, quarto die mensis Julii, anno Domini 1510.' And there are some others, soon after, printed in the same way.

Afterwards follow some books printed and published *cum privilegio*; such as, a translation of Hector Boece, by Mr. John Bellenden, Archdean of Murray, printed by Thomas Davidson, the King's printer, *cum privilegio*, in 1541. The works of Sir

* See an example of this in Rymer's *Fœdera*, 18th April, 1551, tom. 15. p. 255.
David

David Lindsay of the Mount, printed by John Scott, at the expense of Henry Charteris, *cum privilegio regali*, in 1568, &c.

Whether these last were merely licences to print, or *exclusive* privileges, does not clearly appear; though it is certain, that, by degrees, *exclusive* privileges by patent from the Crown, and limited to certain periods, became in use in Scotland as in other countries; but always granted as a matter of favour, upon supplication of the author, or publisher of the work, or of the printer employed by him.

In the reign of Charles II. a new and very dangerous check was given to the liberty of the press in Scotland by the King's printers, who, under pretence of their gifts from the Crown, assumed a power of controlling the press, and of licensing other printers: Particularly it appears, that one Anderson having, in 1671, obtained a gift of this office for forty-one years, he and his widow pretended to very high powers over the press, and which were attended with very bad consequences. Watson, in his *History of Printing*, says, that 'by this gift the art of printing in this kingdom got a dead stroke; for by it no printer could print any thing, from a Bible to a ballad, without Mr. Anderson's licence' ^{Preface, p. 12.} He adds, that under his widow, nothing came from the *Royal Press*, (as Mrs. Anderson vainly termed it) but the most illegible and uncorrect Bibles, and books that ever were printed in any one place in the world. She regarded not the honour of the nation, and never minded the duty lay upon her as the Sovereign's servant. Prentices, instead of the best workmen, were generally employed in printing the sacred word of God. And in fine, nothing was studied but gaining of money by printing Bibles at any rate; which she knew none other durst do, and that nobody could want them. The whole nation being sensible how ill they were served, and the oppression of this monopolizer being the common discourse in most places of the kingdom, those who formerly were her friends, and supported this unaccountable gift, began to be ashamed of her practices, and turned their back upon her. At last, His Royal Highness the Duke of York (our late Sovereign) coming to Scotland, 1680, John Reid informs him, by petition, of the persecution and oppression he and others of his employment had undergone through the extensiveness of Mr. Anderson's gift.

gift. And the matter lying then before the Privy Council, and being moved, His Royal Highness there declared, That it could only be the King's meaning and pleasure, by that gift, that his printer should enjoy what privileges his Royal predecessors were in use to grant to their printers, such as printing of Bibles, Acts of Parliament, etc. Therefore the Council allowed the printers to go on in their ordinary work.'

This matter being set to rights, printers and publishers went on as formerly ; and when they thought it material to have an *exclusive privilege* for a term of years, they applied for, and obtained it. This was held by lawyers to be a part of the prerogative ; though, as Sir George Mackenzie says, the legality of it was much doubted by some, who rather inclined to think, that monopolies, granted by the sole authority of the Prince, were not quite consistent with the nature of a free government. However, upon this footing stood the exclusive privileges of printing all over Europe. It was never once dreamed that they were granted *ex justitia*, in virtue of a perfect right. They were indulged from *favour*, and with a view to expediency, in the same way as patents granted to the contrivers of useful machines. It is remarkable too, that they were at first granted, not to authors, to prompt them to write, but to printers and publishers, to induce them to make correct and useful editions of books which lay in manuscript ; though by degrees they came also to be granted to authors, but still for a limited time, and only meant for the equitable purpose of indemnification. If at any time a more ample privilege was obtained, this could be considered in no other light than as an abuse, being unjust to others, and contrary to the original design of such grants. Fritchius, an

De abusibus auctiorum, on this subject, says, ' Iniquum tamē non est, si quis typogr. tol- super impressione libri, in quem multos erogavit sumptos, lu- lendifis, § 2. crum & commodum aliquod laboris sui præ aliis sentiat, ne par. 4. quod alias fieri possit, aliorum facto in paupertatem inopina- tamē conjiciatur. Quod si tamē abusus privilegii concessi in perniciem reip. verget, dubium non est illud, quocunque etiam modo impetratum sit, justissime revocari, aut tolli posse. Est autem precipuus privilegii abusus hic, quod typographi & bibliopolæ librorum pretia pro libitu augere soleant, quæ ho- die, non sine reip. literariæ decremento in tanquam excrevere,

' ut

ut magistratus rei huic obicem ponendi justissimam caulam habent.'

All the writers and publishers on our law have clearly signified their opinion, that they could not preserve an exclusive right to their works, without a special grant either from the Crown or Parliament. Sir Thomas Craig's book, *De Feudis*, was published under the authority of an act of parliament, obtained in 1633 by his son, Mr. Robert Craig advocate ; granting to him the sole privilege of printing the said book for the space of twenty-one years ; and prohibiting all others from printing and selling the same during that time, under the penalty of confiscation.

Sir Thomas Craig.

Lord Durie's Decisions were published by his grandson, Sir Lord Durie Alexander Gibson, a lawyer ; who obtained an exclusive patent from the Privy Council for nineteen years, from the 12th of July 1688, to print, reprint, import and vend the said book.

Sir John Nisbet of Dirleton's Doubts and Decisions were published by Mr. Robert Bennet, Dean of the Faculty of Advocates, who obtained for George Mosman stationer, burgess of Edinburgh, his heirs and assignees, a patent from the Privy Council in 1697, giving the sole privilege of selling this book for nineteen years, and discharging all others under a penalty.

Sir John Nisbet.

President Gilmour and President Falconer's Decisions were published in the same manner, under a patent, in 1699.

Gilmour and Falconer.

Sir George Mackenzie, advocate to Charles II. and James II. author of some of the most valuable books on the law of Scotland, published his *Criminals* in 1678, under the authority of an exclusive patent from the Privy Council for the space of nineteen years, from 7th April 1677 ; and, upon the expiration of this term, it appears, that Andrew Simpson, who had been Sir George's amanuensis, applied for and obtained a new patent, for the sole printing and publishing another edition of the same book, during the space of nineteen years, from the 11th November 1697, and prohibiting all others to print, &c. under a penalty. And Sir George's other works, which were published by himself, appear to have been guarded by patents in the same manner, and for the same term of nineteen years. See the patents prefixed to the first edition of his *Institutions* in 1684, and to the first edition of his *Observations* in 1687. This last patent he assigns to Thomas Brown stationer, his heirs and assignees,

nees, ' to do and act in virtue thereof, in all points, as fully and freely as I might have done myself.'

Lord Stair. Lord Stair, one of the greatest of our lawyers, thought it necessary to secure, by a patent to his printer, the sole privilege of printing and publishing his valuable works for nineteen years. The patent from King Charles II. bearing date the 11th April, 1681, is inserted after the epistle dedicatory of the first volume of his Decisions. It is intituled, ' His Majesty's gift and privilege to Sir James Dalrymple of Stair, for printing his Institutions,' &c. It proceeds on a narrative of the usefulness of these works, and his Majesty ' being willing to give to the said Sir James, all encouragement therein ;' therefore ratifies an agreement which he had made with his printer, and prohibits all others to print the said books for the space of nineteen years, without the special leave of the said Sir James, his heirs and successors. This patent contains no penalty upon contravention ; it is a simple grant of exclusive right for nineteen years, which surely there was no occasion for, if the author had by common law an exclusive right for ever.

Sir James Stuart. Sir James Stuart, advocate to Queen Anne, took out a patent of the same nature, when he published his abridgment of the acts of parliament, and assigned it to his printer ; the term limited being nineteen years, from the 25th September 1701.

Forbes. Mr. Forbes, when he published his treatise on tithes in 1705, got a similar patent from the Privy Council for nineteen years, proceeding on this narrative ; ' That where the said Lords are in use to encourage the author of any new book, by granting to him the sole privilege of printing and vending the same.' The like patent is prefixed to the second part of his Justice of Peace, in 1707. What use was there for this encouragement, if authors had a perpetual exclusive right at common law ?

The opinions of these lawyers, expressed *nebus, ipsis et factis*, in a matter concerning themselves, must have great weight. They show more clearly what was understood to be the law of Scotland, than the most direct authorities from their books could have done. Their works are silent upon the subject, but the reason is plain, because the notion of literary property was not then conceived in Scotland. All that any of our authors ever looked for, was an exclusive right by patent, or by act of parliament, for a certain number of years ; and it may be observed, that several of these books have been republished since the expiration

ration of the patents, not by the heirs of the authors, but by strangers, without any challenge.

It was said, that patents were the fashion of the times; that Sir George Mackenzie was an advocate for prerogative, and Lord Stair was not, *in condition to preserve his property*, without using the means then in practice; that the patents did not *create* the right, but only tended to secure and preserve it by a public prohibition; and that they were often without any penalties annexed, which showed, that an action of damages lay at common law.

The defenders must be permitted to say, that these observations appear to them in a very extraordinary light. Sir George Mackenzie was at the head of the bar, Lord Stair President of the Session, and both were very able to preserve their rights against any unlawful invasion of them. Lord Stair's patent being merely prohibitory, without any mention of a penalty, affords a strong argument against the pretended common law-right, as already said; for if he had an exclusive privilege at common law, what earthly advantage did he obtain by the patent? It, on the other hand, he had none such by the common law, the patent was necessary to *create* a right in his favour, which might be the foundation of a claim for restitution and damages in case of violation. All these patents were understood to be *creative*, not corroborative of the author's right.

Neither did any alteration happen in consequence of the Union: On the contrary, the necessity of patents was rather enforced, from this circumstance, that, by the Union, the English laws relative to trade were communicated to Scotland, and among others, that most salutary English statute, 21 Ja. I. cap. 3, prohibiting all grants of monopolies to any person, except the first inventor of a new manufacture, and to him only for the term of fourteen years, and from which statute, 'any letters ' patent, or grants of privilege, heretofore made, or hereafter ' to be made, for or concerning printing,' are also excepted.

The first time that ever this question appears to have been stirred in Scotland, was in the year 1743, when Daniel Midwinter, and other booksellers in London, brought an action before the Court of Session, against the booksellers of Edinburgh and Glasgow, complaining, that the defenders had transgressed the statute of Queen Anne, by printing, reprinting, &c. the several books therein

therein specified, without consent of the pursuers, who had purchased these books from the authors; and therefore, concluding for the penalties and forfeitures of the statute: At least, that the defendants ought to pay *damages* for every surreptitious copy, on account of their having invaded the property of the pursuers. In this action, the alternative claim of damages, to which at last the pursuers restricted their action, gave occasion to much argument upon the alledged common-law right, a topic then for the first time broached in Scotland. The case is very well abridged in a Collection of Decisions lately published: But as it will fall to be more particularly noticed under the next head, concerning the act of Queen Anne, the defenders shall only at present observe, That neither the pleadings here, the judgment of the Court of Session, nor what afterwards passed in the House of Lords in that case, were in any degree favourable to the pretended common-law right.

The author of the late Institute, who wrote posterior to the case of Midwinter, is the first Scots law writer who has taken notice of authors of books being entitled to any privilege; and as he gives them nothing but what they are entitled to by the act of Queen Anne, so it is plain, that he rejects any common-law right. He brings in their privilege, under the class of *monopolies*, and says, 'It is only granted to authors of books, or their assigns, that enter them in Stationers Hall in London, as the statutes in that behalf direct; and in such case, they are entitled to the sole right of printing or selling the books for fourteen years after the publication.' He then mentions the case of Midwinter, and mistakes the decision, not knowing that the last interlocutor was in favour of the Scots booksellers. But he says not one word of a common-law right; he founds the right of authors entirely upon the statute: And indeed, when he published his own book, he thought it necessary to comply literally with the terms of the statute, by entering it in Stationers-hall, in order that he might have the benefit of the act.

In the late abridgement of the statute-law of Scotland, the act of Queen Anne is placed under the word *monopoly*; which goes some length to show that author's opinion.

In further evidence of the common law of Scotland, the understanding of the country may be appealed to. Many must have been the trespasses, and many the violations of this property by

Remark.
Decis. June
7. 1748.

McDowal,
b. 1. tit. 19.
§ 11. & 12.

by printers and booksellers, if we can suppose it to have existed; but which never were in any one instance complained of, or brought before a court in this country, except in the case of Midwinter, when no encouragement was given to it. The defenders are ready to produce evidence of numberless publications carried on in Scotland openly and avowedly against the supposed perpetual right of authors, and they call upon the other party to show a single case in which this was ever found illegal.

If such a property had existed in Scotland, it ought to have manifested itself in some *ouvert* manner, in the way of transmission, sale, diligence, forfeiture, or testament. It is either a real or a personal property: It ought either to have been the subject of service or confirmation: It ought to have been attachable by creditors; conveyable by disposition; an object of prescription positive or negative; an estate or interest, falling under gifts of *ultimus heres*, forfeiture, and escheat. Authors are often poor, and some instances ought to have appeared of their surrendering their ideas in a *ceffio bonorum*. The defenders have in vain endeavoured to find this property in some one or other of these shapes. They can discover no vestige of it, except now and then, that a royal patent, limited to a term of years, has been conveyed by assignation or testament. The case may be otherwise in England; but certain it is, that no such existence is to be found in any part of the law or practice of Scotland.

An opinion of the late Mr. York, obtained in the case of Mrs. Ruddiman against Rivington, concerning a violation of her right, under a patent obtained by her deceased husband, has been founded on by the pursuer in this cause. When the opinion is looked into, it will be found to give no judgment upon the common-law right even in England, far less in Scotland, but only to point out the easiest method of applying for redress against an English bookseller, *viz.* by bill in Chancery for an injunction: And it sets out with saying, that Mrs. Ruddiman's right *depends on the law of Scotland*, where Mr. Ruddiman lived and died. So far the opinion will be admitted to be applicable to this case. As not only the defenders live, but the action is brought in Scotland, the law of Scotland must undoubtedly be the rule here; and they cannot, with submission, conceive a proposition more clear, than that the law

of Scotland rejects the idea of an exclusive right, after publication.

III. ^{Act of} ~~Q. Anne.~~ The next question is, Whether the act of Queen Anne made any alteration upon our law favourable to the pursuer's claim? This act took its rise from a petition of the London booksellers; and, by way of introduction to the statute, it may be proper to enquire, what were the rights claimed or exercised by the Stationer's Company of London prior to that period, and, what may have been their views in applying for a new law.

The liberty of the press, or, as Milton calls it, *the liberty of unlicensed printing*, was invaded in England much about the same time that it was in Scotland, and from the same causes.

It has already been said, that the first printers carried on their business as a lawful employment, without any patent or licence. Caxton's title pages never bear *cum privilegio*, but only these humble words: 'Imprinted by me simple man William Caxton.'

In 1539 injunctions were issued, in the King's name, against importing books from abroad without examination of the King or his council (or some person appointed), particularly English books; or printing, publishing, and selling within the realm, English books of Scripture, without examination by the King's Highness, or one of his council, or one Bishop whose name was to be expressed.

In 1555, there was a proclamation by Philip and Mary against importing heretical and seditious books, specifying the books of all the great reformers of Europe, English and foreign. This was said to be founded on a statute of Henry IVth. for repressing heresies.

In 1556, the first charter was granted to the stationers company, requiring all printers to be of that company, and giving power of search and seizure, in respect of all books printed or stamped contrary to the form of any statute or proclamation.

In 1559, additional injunctions were published against heretical and seditious books, requiring in the first instance, previous to the printing or publishing of any books, the licence of the Queen in writing, or of six privy counsellors, the Archbishops of Canterbury and York, the Bishop of London, the Chancellors of the two Universities, the Bishop, (being Ordinary,) and the Archdeacon, or any two of them, the Ordinary of the place being one.

one. As to pamphlets, plays and ballads, (wherein regard was to be had, that nothing be seditious, heretical, or unseemly for Christian ears,) such writings were turned over to be licensed by the commissioners of ecclesiastical causes.

This was the first general regulation for licensing in England, and as it flowed from the royal authority, so it appears that many unconstitutional proceedings, with regard to printing, were enforced from time to time by ordinances of the Star Chamber ; and that the stationer's company was encouraged and supported as a creature of the crown, and used as an engine for promoting those arbitrary measures.

Nothing indeed could be more ridiculous than some of the patents that were given. Thus, Christopher Saxton having represented to Queen Elisabeth that he had travelled over divers parts of England, and made *pleasant maps* thereof, and intended to travel still more, a patent was obtained by him from her Majesty, during ten years, to make as many pleasant maps, as to him should seem meet, and forbidding all her loving subjects to do the same. Another man got the liberty of printing ‘ all sorts of things that are, may, or shall be printed on one side of a sheet, provided the other side be white paper ’

The Stationers Company pretended to various exclusive privileges, and they had letters patent from the crown giving them temporary rights to the sole printing and publishing certain books. They had likewise regulations and agreements among themselves, by which any member of the corporation who claimed a right of printing any particular book by patent or otherwise, was to enter the same in the register of the company, and the other members were not to encroach upon the right or privilege thus claimed. By degrees the entry in this register-book of the company became a criterion or mark by which the individuals of the company regulated questions among themselves; but which could be of no avail as to others..

Soon after the Restoration, a general licensing act was passed, (1662, cap. 33.) entitled, ‘ An act for preventing abuses in printing seditious, treasonable, and unlicensed books and pamphlets, and for regulating of printing and printing presses.’ By this statute it was enacted, ‘ That no private person whatsoever shall at any time hereafter, print, or cause to be printed, any book or pamphlet whatsoever, unless the same book.

' book or pamphlet, together with all and every the titles, e-
 ' pistles, prefaces, proems, preambles, introductions, tables,
 ' dedications, and other matters and things thereunto annexed,
 ' be first entered in the book of the register of the Company of Stationers of
 ' London,' (except acts of parliament, and some others); ' and un-
 ' less the same book and pamphlet, and also all and every the
 ' said titles, &c. shall be first lawfully licensed and authorised
 ' to be printed, by such person or persons only as shall be con-
 ' stituted and appointed to license the same: That is, that all
 books concerning the common laws of the realm, be printed by
 the special allowance of the Lord Chancellor, or Lord Keeper of
 the great seal of England, Lords Chief Justices, and Lord Chief
 Baron, or one or more of them, or by their appointments; all
 books of history, or other books concerning the state, by the
 principal secretaries of state; all books concerning heraldry by
 the Earl Marshal, &c. ' And all other books to be imprinted or
 ' reprinted, whether of divinity, physic, philosophy, or what-
 ' soever science or art, shall be first licensed and allowed by the
 ' Lord Archbishop of Canterbury, and Lord Bishop of London
 ' for the time being, or one of them, or by their or one of their
 ' appointments, or by either of the Chancellors or Vice-chancel-
 ' lors, of either of the universities of the realm for the time be-
 ' ing: Provided always, that the said Chancellors or Vice-chan-
 ' cellors of either of the said universities, shall only license such
 ' books as are to be imprinted or reprinted within the limits of
 ' the said universities respectively, but not in London or else-
 ' where, not meddling either with books of common laws, or mat-
 ' ters of state or government, nor any book or books, *the right*
 ' *of printing whereof doth solely or properly belong* to any particular
 ' person or persons, without his or their consent first obtained
 ' in that behalf.

These last words are taken hold of as implying a copy-right
 in authors at common law. But that this was not meant, ap-
 pears from an after clause of the act, in which the rights of in-
 dividuals are more fully explained and saved, in these words:
 ' And be it further enacted, That no person or persons shall,
 ' within this kingdom, or elsewhere, imprint, or cause to be
 ' imprinted, nor shall import or bring in, or cause to be im-
 ' ported into this kingdom, from or out of any other his Majes-
 ' ty's dominions, nor from any other parts beyond the seas,
 ' any

any copy or copies, book or books, or part of any book or books, or forms of blank bills or indentures for any of his Majesty's islands, printed beyond the seas, or elsewhere, which any person or persons by force or virtue of any *letters patent* granted or assigned, or which shall hereafter be granted or assigned to him or them, or (where the same are not granted by letters patent,) by force or virtue of any entry or entries thereof, duly made, or to be made in the register-book of the said Company of Stationers, or in the register-book of either of the universities respectively, have or shall have the right, privilege, authority or allowance, solely to print without the consent of the owner or owners of such book or books, copy or copies, form or forms, of such blank bills, nor shall bind, stitch, or put to sale, any such book, or books, or part of any book or books, form or forms, without the like consent, upon pain of loss and forfeiture of the same, and of being proceeded against as an offender against this present act,' &c.

It is plain that the rights here meant to be protected are those conferred by special privilege, either to individuals or to universities, or those rights which the stationers claimed in questions with one another by virtue of entries in their register-book.

This appears to be the first statute in which any notice is taken of the register of Stationer's Hall, and it does not contain the least insinuation of a property in all authors at common law. On the contrary, one clause of the act says, that printing is 'an art and manufacture of the kingdom,' and the whole tenor of it supposes, that every person is entitled to print and publish, unless in so far as restrained by the statute itself, or by special exclusive privileges belonging to individuals.

This act was only to continue in force for a limited time, which was renewed afterwards, but finally expired in 1694.

From the rules and ordinances of the Stationer's Company, it is clear, that they themselves did not entertain the idea of a literary property in authors at common law.

Thus, at an assembly of the master and wardens, &c. of the said Company, upon the 17th August 1681, it was, *inter alia*, resolved: ' And whereas several members of this Company have great part of their estates in copies; and by ancient usage of this Company, when any book or copy is duly entered in the register-book of this Company, to any member or members of

‘ this Company, such person to whom such entry is made, is,
 ‘ and always hath been *reputed and taken to be proprietor* of such
 ‘ book or copy, and *ought to have the sole printing thereof*, which
 ‘ privilege and interest is now of late often *violated and abused*.
 ‘ It is therefore ordained, That *where any entry or entries, is, or*
 ‘ *are, or hereafter shall be duly made of any book or copy in the said*
 ‘ *register-book of this Company, by or for any member or mem-*
 ‘ *bers of this Company*; that in such case, if any *other member or*
 ‘ *members of this Company* shall thereafter, without the license or
 ‘ consent of such member or members of this Company, for
 ‘ whom such entry is duly made in the register-book of this
 ‘ Company, or his or their assignee or assigns, print, or cause to
 ‘ be printed, import, &c. any such copy or copies, book or
 ‘ books, &c. or shall sell, bind, stitch, or expose the same, or
 ‘ any part or parts thereof, to sale, that then *such member and*
 ‘ *members so offending, shall forfeit to the masters, and keepers*
 ‘ *or wardens, and commonalty of the mystery or art of Station-*
 ‘ *ers of the city of London, the sum of twelve pence for every*
 ‘ *such copy or copies,’ &c.*

‘ By another article, ‘ *Whereas his most Excellent Majesty,*
 ‘ *King Charles II. that now is, by his letters patents under the*
 ‘ *great seal of England, bearing date the 11th day of October,*
 ‘ *in the 18th year of his reign, did grant unto the master, and*
 ‘ *keepers or wardens, and commonalty of the mystery or art*
 ‘ *of Stationers of the city of London, and their successors, li-*
 ‘ *cense, authority, and privilege only to print, utter, and sell*
 ‘ *the several books therein to them particularly mentioned, for*
 ‘ *a term of years yet in being; It is therefore ordained, that*
 ‘ *if any member or members of this Company shall hereafter, during*
 ‘ *the continuance of the term in the foresaid letters patents granted,*
 ‘ *without the license or consent of the said masters, and keepers*
 ‘ *or wardens, and commonalty of the mystery or art of Stationers*
 ‘ *of the city of London, imprint, or cause to be imprinted, or*
 ‘ *import, &c. any such book or books, or put to sale, contrary*
 ‘ *hereto; then such member shall forfeit to the keeper or war-*
 ‘ *dens, &c. for every such book, twelve pence.’*

‘ And by another article, it is ordained, ‘ *That where the sole*
 ‘ *printing of any copy or copies, book or books, is already*
 ‘ *granted to any member, or members of this Company, by any let-*
 ‘ *ters patents of his now Majesty, or any of his Royal predeces-*
 ‘ *fors,*

sors, Kings, or Queens of this realm ; or where the printing of any copy or copies, book or books, is by any *letters patent* granted to any person or persons, not being a member or members of this Company, to his and their own use ; or when the printing of any copy or copies hereafter shall be granted by his now Majesty, or any of his Royal successors, to any member or members of this Company, to his and their own use ; or such *letters patent* shall be duly and legally assigned to any member or members of this Company, to his and their own use : Then, if any other member or members of this Company shall, without the license or consent of such owner or owners, or the executor or administrator of such owner or owners (*being a member or members of this Company*) of such copy, or book, &c. print, or cause to be printed, or import, or put to sale, any copy, &c. such member shall forfeit twelve pence to the Company for every such book.'

These regulations seem to point out, what was the sense of the Stationers Company, with respect to this matter. The first article above recited, does not pretend that there was any such thing as a common-law property, but is founded on a supposed usage *among themselves* ; by which, when any book is entered in the register of the Company, as belonging to any particular member, the book is *reputed* to be his property, and the other members oblige themselves not to interfere with him in it, though they often violate this obligation ; and therefore, by *private concert* among themselves, they agree that they shall not encroach on one another's rights, established in this manner, by the rules of the Company. The other two articles expressly acknowledge the Royal letters and patents, to be the sole foundation of any exclusive privilege belonging either to the Company in general, or to individuals.

Thus matters stood when the act of Queen Anne was applied for ; and it is material to attend to the proceedings on that occasion !

Upon examining the Journals of the House of Commons, it appears, that, on the 12th December, 1709, ' A petition of Henry Mortlock, &c. on behalf of themselves, and other book-sellers and printers in and about the city of London, and elsewhere, was presented to the House and read ; setting forth, That it has been the constant usage so the writers of books,

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to sell their copies to booksellers or printers, to the end they might hold those copies *as their property*, and enjoy the profit of making and vending impressions of them; yet divers persons have of late invaded the properties of others, by reprinting several books without the consent, and to the great injury of the proprietors, even to their utter ruin, and the discouragement of all writers in any useful part of learning: And praying, that leave may be given to bring in a bill, *for securing to them the property of books bought and obtained by them.*

Here it is to be observed, That the narrative or preamble of this petition (which is to be considered as the assertion of the booksellers who presented it) differs from the subsumption. The narrative does not alledge, that at common law authors or booksellers had any right of property; but only that there had been an *usage* among them of purchasing books, to be held *as their property*: Which is a plain acknowledgment by the petitioners themselves, that there was no real property, but only something which they had been pleased to view *as* a sort of property, or compare or *liken* to a property. But the subsumption immediately infers from this, that they actually had a property, entitled to the protection and aid of the law; which, however artful, is neither consistent nor conclusive.

It would seem, That the view of the booksellers in their petition was, to be secured in a *perpetual* property of their books, not a *temporary* exclusive right. They had been pleased to figure to themselves, that an author, or the person to whom he sold his work ought to be considered as the proprietor of it. Their own particular rules, and the boundaries settled with one another, had given birth to this idea, however adverse to the true meaning of those very rules. They were diffident however of the strength of common law to support them in it; and therefore they made this application to Parliament, hoping to have the question decided in their favour: A question highly important to the London booksellers, who were in possession of all the most valuable books, but of little consequence to authors; and accordingly not one author joins in the application.

Leave having been given to bring in the bill, 11th January

Vol. 16. 1709, 'Mr. Wortley, according to order, presented to the
P. 240. ' House, A bill for the encouragement of learning, and *for securing*

‘ curing the property of copies of books to the rightful owners thereof; and the same was received, and read the first time.’

The bill was then ordered to be read a second time, and further consideration of it lay over till the 2d February, when the booksellers, being afraid that it would be lost or neglected, obtained a new petition to be given in, from ‘ the poor distressed printers and bookbinders in London and Westminster; setting forth, That the petitioners having served seven years apprenticeship, hoped to have gotten a comfortable livelihood by their trades, who are in number at least 5000; but the liberty lately taken of some few persons printing books, to which they have no right to the copies, is such a discouragement to the bookselling trade, that no person can proceed to print any book without considerable loss, and consequently the petitioners cannot be employed; by which means the petitioners are reduced to very great poverty and want: And praying, that their deplorable case may be effectually redressed, in such manner as to the House shall seem meet.’

Here the poor printers and bookbinders are introduced to revive and second the petition of the rich booksellers. It will not escape notice, that the fact upon which this petition rests, does by no means infer the conclusion: For how should the printing of books make printers or binders lack employment, and reduce them to poverty and want?

9th February 1709, The bill was read a second time and ordered to be committed.

21st February 1709, ‘ Mr. Compton reported from the Committee, that they had gone through the bill, and made several amendments, which they had directed him to report, when the House were pleased to receive the same.’

25th February 1709, ‘ Mr. Compton reported, from the Committee of the whole House, the amendments they had made on the bill; and he read the same in his place, and afterwards delivered them in at the clerk’s table; where they were once read throughout, and then a second time, one by one; and upon the questions severally put thereupon, with amendments to some of them, agreed unto by the House.’

‘ Ordered, That the bill with the amendments be engrossed.’

14th March 1709, ‘ An engrossed bill for the encouragement of learning, by vesting the copies of printed books, in the authors

‘ authors or purchasers of such copies, during the times therein mentioned,’ was read the third time.

‘ Resolved, That the bill do pass, and that the title be, A bill for the encouragement of learning, by *vesting* the copies of printed books, *in the authors or purchasers* of such copies, *during the times therein mentioned.*’

Here it is material to advert, That the title given to the bill when engrossed, and which the House resolved it should bear when they passed it, is extremely different from the title the bill had when presented by Mr. Wortley. The title originally given, was agreeable to the views of the booksellers, and seemed to imply, that the authors or purchasers of books, had, *ab ante*, a right of property in the copies: Whereas the title given to it, when engrossed and passed, *viz.* ‘ A bill for the encouragement of learning, by *vesting*, &c. as plainly implies, that the authors or purchasers had no right of property, but what was given by this act, and would have none after the times mentioned therein should expire. The intention of the booksellers was to have a perpetual property ascertained: The parliament would only vest in them a temporary, conditional, and limited right. Neither was this title given *per incuriam*: On the contrary, it appears to have been an *amended title*, given upon mature consideration, for the very purpose of showing, that the legislature did not acknowledge an *ab ante* right.

Vol. 16. 5th April 1710. ‘ The House proceeded to take into consideration the amendments made by the Lords to the bill, intituled, *An act for the encouragement, etc.* and the same were read, and are as follow.’

The first four amendments being of no consequence, it is needless to insert them.

The next is, To leave out the fourth section, about regulating exorbitant prices: and the last amendment is, to add the following proviso to the end of the bill: ‘ Provided always, that after the expiration of the said term of fourteen years, the sole right of printing, or of disposing of copies, shall return to the authors thereof, if they are then living, for another term of fourteen years.’ This was a most extraordinary clause to be added, if by common law the sole right was to return to them for ever.

All the amendments were agreed to, except that respecting the prices.

Ordered, ‘ That a Committee be appointed to draw up reasons,

sons, to be offered to the Lords at a conference, for disagreeing to the said amendment.' And it was referred to Mr. Secretary Boyle, and several others, (of whom Mr. Addison was one), who were ordered to withdraw immediately into the Speaker's chamber, and report to the House.

Mr. Compton reported from the Committee, That they had drawn up reasons, which he read in his place, and afterwards delivered in at the clerk's table, and are as follow: ' That Vol. 16.
 ' the Commons disagree to your Lordships amendments, in pr. P. 395.
 ' 3. l. 14. *First*, Because authors and booksellers having the
 ' sole property of printed books *vested in them by this act*, the Com-
 ' mons think it reasonable, that some provision should be made,
 ' that they do not set an extravagant price on useful books. *2dly*,
 ' Because the provision made for this purpose by the statute, 25th
 ' Henry VIII. chap. 15. having been found to have been ineffec-
 ' tual, and not extending to that part of Great Britain called *Scot-*
 ' *land*, it is necessary to make such a provision as may be effec-
 ' tual, and which may extend to the whole united kingdom.
 - The Lords did not insist upon their amendment.

This conference about regulating the prices, affords a strong additional evidence of what was understood. The meaning of the act was not to declare a pre-existing right in authors, which they might use at their discretion; but to confer a *new right* for a term of years, and which therefore it was reasonable the parliament should grant upon its own terms. This is the very argument used by the Commons, and at length acquiesced in by the Lords; the restriction of the price being thought necessary, in order to prevent the ill effects of the monopoly thus given by the statute. It did not *then* occur, that the very same author, who, during the term of the statute, was limited as to his price, was, at the expiry thereof, to become quite unlimited, and, at the same time, to retain the exclusive power of selling his works for ever.

The act was passed, *verbatim*, as hereto annexed. But it may be observed, That the *fourth* clause, respecting the regulation of prices, was afterwards repealed by an act in the 12th of Geo. II. cap. 36. because, upon trial, it was found not easy to be executed; so that the prices are now left to the discretion of booksellers, and the monopoly is thereby rendered so much the more dangerous.

Not only does the *title* of the act show what was understood
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by parliament, but the *enacting clauses* do in the most explicit manner point out, that a common-law right was not meant to be confirmed; but a statutory-right granted for a certain time, under certain conditions. The preamble indeed uses the word *proprietors*, as synonymous with *authors*; but the enacting words are more correct. The preamble says, ‘Whereas printers, book-sellers, and other persons, have of late frequently taken the liberty of printing, reprinting, and publishing; or causing to be printed, reprinted, and published, books, and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families.’ The enacting words are; ‘For preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books; be it enacted, That from and after the 10th of April 1710, the *author* of any book or books already printed, who hath not transferred to any other, the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have the *sole right and liberty* of printing such book and books, for the term of one and twenty years, to commence from the said 10th day of April, and no longer; and that the *author* of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his *assigney or assigns*, shall have the sole liberty of printing and reprinting such book and books, for the term of fourteen years, to commence from the day of first publishing the same, and no longer.’ Then follow the penalties on transgressors of the act, by forfeiture of the books, etc. and provisoes for entering in Stationers Hall, presenting copies to the Universities, and regulating the prices.

That the word *proprietors*, in the preamble of this act, does not mean to declare any antecedent property in authors or their assigns, but is used in a sense not strictly proper, appears not only from what follows in the act itself, but from other instances in the statute-law, where the same word is used to express a monopoly or exclusive right, specially conferred, without any pretence of an actual *property*, in the strict and true sense of the word. For example; the act 8vo Geo. II. cap. 13. for encouragement

rageiment of the arts of designing, engraving, and etching prints, says, ' Whereas divers persons have, by their own genius, industry, pains, and expence, invented and engraved, or worked in *mezzotinto*, or *chiaro oscuro*, sets of historical and other prints, in hopes to have reaped the sole benefit of their labours: And whereas printsellers, and other persons, have of late, without the consent of the inventors, designers, and proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing, or causing to be copied, engraved, and published, base copies of such works, designs, and prints, to the very great prejudice and detriment of the inventors, designers, and proprietors thereof.—For remedie thereof, and for preventing such practices for the future, be it enacted, &c. That from and after the 24th day of June, which shall be in the year of our Lord 1735, every person who shall invent and design, engrave, etch, or work in *mezzotinto*, or *chiaro oscuro*, or from his own works and invention, shall cause to be designed and engraved, etched, or worked in *mezzotinto*, or *chiaro oscuro*, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same, for the term of fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints.' Then follow the like forfeitures and penalties, as in the act concerning books.

The one act seems in a great measure to be copied from the other. And indeed, upon looking into the Journals of the House of Commons, it appears, that the petition of the engravers refers to the law in favour of authors, and desires to be put on the same footing. No two subjects can be liker, and no two acts of parliament can more nearly resemble one another; yet it never was thought, that the designer of a print had an inherent exclusive right to hinder others from copying that print, after having published it, or that he was in this sense proprietor of his invention. It never was maintained, that he had a common law property, or exclusive right of any kind, independent of statute.

By an act in the 7th of his present Majesty, cap. 38. it was further provided in favour of engravers, " That all and every person and persons who shall engrave, etch, or work in *mezzotinto*,

or *chiaro oscuro*, or cause to be engraved, etched, or worked, any print taken from any picture, drawing, model, or sculpture, either ancient or modern, shall have, and are hereby declared to have, the benefit and protection of the said act, and this act for the term herein after mentioned, in like manner as if such print had been graved or drawn from the original design of such graver, etcher, or draftsman ; and if any person shall engrave, print, and publish, or import for sale, any copy of any such print, contrary to the true intent and meaning of this and the said former act, every such person shall be liable to the penalties contained in the said act, to be recovered as therein, and herein after is mentioned.'

By this act, the term of the exclusive privilege is prolonged as follows : ' That the sole right and liberty of printing and reprinting, intended to be secured and protected by the said former act and this act, shall be extended, continued, and be vested in the respective proprietors, for the space of *twenty eight* years, to commence from the day of the first publishing of any of the works respectively herein before, and in the said former act mentioned.'

On account of the extraordinary genius of Hogarth, his widow was, by another clause of the same act, indulged with a particular monopoly of his prints for *twenty years*, to commence from January 1767, over and above the fourteen years which Hogarth himself had had by the act, 8th of George II. But as in the interval between the expiry of the first privilege, and the commencement of the second, several engravers had copied and published Hogarth's works, the following clause is very properly added in the act 7th of his present Majesty.

' Provided nevertheless That the proprietor or proprietors of such of the copies of the said William Hogarth's works, which have been copied, and printed, and exposed to sale, after the expiration of the term of fourteen years from the time of their first publication by the said William Hogarth, and before the said first day of January, shall not be liable or subject to any of the penalties contained in this act, any thing herein before contained to the contrary thereof in any wise notwithstanding.'

Here the legislature made a very just distinction. No person was to be punished, or sued in any action, for publishing Hogarth's

garth's works, after the monopoly of fourteen years had elapsed; and nothing could restrain any person from continuing so to do, but this new law, giving a further monopoly for twenty years. It is to be observed too, that throughout the whole statute, although *property* and *proprietor* are the terms used, nothing more was meant than a statutory exclusive right; not an actual, but a *quasi property*, the creature of that particular statute; and the same observation does clearly apply to the statute of Queen Anne concerning books.

It is remarkable, that even the *copiers* of Hogarth's prints are called *proprietors* in the above clause, in as large a sense of the word as he is himself. The booksellers had introduced these cant words *property* and *copy-right*; and they were naturally made use of by others, as phrases belonging to the trade; they were copied from the petition of the booksellers into the act of Queen Anne, and from thence into the statutes of his late and present Majesty. It is justly observed by Mr. Blackstone, That words Vol. I. p. 59. ' are to be understood in their usual and most known significa-
tion, not so much regarding the propriety of grammar as their general popular use; and in particular, ' terms of art, or technical terms, must be taken according to the acceptance of the learned in each art, trade, and science.'

That the above is a just construction of the statute of Queen Anne, may further be illustrated from the report in the case of Midwinter, where the argument upon the statute is laid down with great precision. Treating of the right of an author after publication, the reporter says: ' All that remains with him is p. 157. ' an exclusive privilege, granted by the statute, of reprinting this book, and of barring others from reprinting or vending it under certain penalties. It is neither more nor less than creating a monopoly, barring others from dealing in that particular commodity; the direct consequence of which is, that so far as restrained by statute they must submit; but that, in all other particulars, their natural liberty is preserved entire. It is true, this monopoly or exclusive privilege is named a *property* in the statute; and so it is in one sense, because it is proper or peculiar to those to whom it is given by the statute. But then it was not intended to be made *property* in the strict sense of the word; for we cannot suppose the legislature guilty of

‘ of such a gross absurdity, as to establish property without a subject or *corpus*: These are relative terms which cannot be disjoined; and property, in a strict sense, can no more be conceived without a *corpus*, than a parent can be conceived without a child. But if the words of the statute shall be laid hold of, neglecting its spirit and meaning, all that can be concluded is, that it is a property *ad certum effectum* only, granted in order to support the several actions and penalties directed by the statute. It is a statutory property, and not a property in any just sense to be attended with any of the effects of property at common law.’

‘ In the *second* place, Supposing so absurd a thing as that a real property is established by the statute, it appears evident, that the pursuers can take no advantage of it, when they have not fulfilled the conditions upon which it is granted. The very first clause of the statute, which talks of bestowing the property upon the author, is what follows: ‘ And whereas many persons may, through ignorance, offend against this act, unless some provision be made, whereby the property in every such book as is intended by this *act*, things to be secured to the proprietor may be ascertained,’ &c. Here two things are plainly implied, or rather expressed: *1st*, That the property is not intended to be bestowed in every case; for the words are, ‘ Whereby the property in every such book, as is intended by this *act* to be secured to the proprietor, may be ascertained.’ *And 2dly*, The property is not bestowed directly upon composing, but is to be claimed or ascertained in a certain form established in the statute, viz. by entering in Stationers Hall, the name of the book, and the author’s consent for printing the same. Upon these conditions the property is bestowed, and not otherwise: Nor does this argument land in a criticism upon words; it is founded on the very nature of the thing; for if it be true in fact, that many persons of distinction amuse themselves with composing books, without intending to take any pecuniary benefit by the publication, must it not be competent to every mortal to deal in such books, as much as it was to deal in all books before exclusive privileges were invented? It follows therefore, that every author, who intends to make profit of his works, must signify the same to the public, or, in the

the language of the statute, must have the property ascertained to him. And, as the method for claiming or ascertaining this property is also laid down in the statute, there must be established a *presumptio juris et de jure*, that every new book, which is not thus entered in Stationers Hall, is abandoned to the public, and a lawful subject of commerce for every man to deal in.

In the *third* place, Supposing all obstructions removed which bar the pursuers from a property in this case, strictly taken, and suppose their property to be such as to afford the same actions that may be founded on real property ; yet it does not appear, that they could take any benefit from these concessions : for how are damages to be ascertained ? The only footing to go upon is to show how far the proprietor's sale is lessened by interlopers. But this can never be determined otherwise than by mere conjecture : The proprietor himself cannot be certain, that the persons who dealt with the interlopers would have purchased from him, without which the ascertaining damages is beyond the reach of law. And the pursuers tacitly yield this point, when they agree to confine their claim of damages to the supposed profits made by the defendants. Their claim, so qualified, does indeed relieve them of some part of the difficulty of proof, by no means of the whole ; because an interloper, who has some part of a piratical edition in his possession, cannot know what profits he makes till the whole be sold off. But to let this pass : Where is the foundation in law, equity, or common sense, to deprive the defendants even of their profits, unless the pursuers can specify that they have suffered thereby ? If their sale be not lessened, they have no just ground of complaint. Let us give an example, which shall be Millar's Dictionary, published in two folios, and sold at a price beyond the reach of common gardeners. If a printer shall undertake an impression of this book on a very small type and very coarse paper, which will be purchased only by common gardeners, Philip Millar and his assigns will not lose a shilling by this edition : yet by this low-priced book, knowledge in gardening is spread much to the benefit of the public. Would it be reasonable or just to deprive such an undertaker of his profits, when the public gain by the undertaking, and Mr. Millar loses nothing ? It is obvious then, that this claim for profits cannot be

‘ supported less or more as a claim of damages, when there is really no damage to the party privileged, or, which is the same, where damages cannot be proved.’

These, and other arguments used upon that occasion, are a better commentary upon the act than any that the defenders can make. The Court of Session found in that case, ‘ That no action lies upon the statute, except for such books as have been entered in Stationers Hall, in terms of the statute. And found, That no action of damages lies upon the statute.’

The cause was appealed by the London booksellers to the House of Peers; and having come to a hearing, it was the opinion of that most honourable House, that the action ought to be dismissed as irrelevant, without prejudice to the points pleaded therein, when they should be properly brought in judgment; and accordingly an order was given to that purpose.

The London booksellers were so little encouraged by this decision, and by what passed in the House of Lords upon occasion of it, that they never ventured to renew their action in Scotland, though it is well known how desirous they were to extend their schemes of monopoly over the whole island, and to prevent all interference of their brethren here. This they have not yet been able to accomplish, and it is hoped never will.

It is indeed, with submission, thought, that the act of Queen Anne leaves no room for the pretence of a common-law property independent of the statute. Your Lordships, in the only question of the kind which has come before you, seem to have considered it in that light. At the same time, it is a possible case, that the view of the legislature may have been to settle a contraverted point, by ascertaining this claim of property for a certain limited time, and fixing the boundary there, so as to cut off all pretences *quoad ultra*. The word *vesting* seems rather to show, that the antecedent right was in no shape acknowledged. But taking the act in either tense, as conferring a new right which had never before existed, or as declaratory so far of a right *ab ante* claimed; it does not occur to be a doubt that this right, whether vested or declared, is, by the express tenor of the act, limited in its duration, and made entirely dependent on the statute.

Other instances might be given, of rights clearly founded in common law being limited by statute. Bribery was a ground for reducing the elections of magistracy, long prior to the act 14th of George II. whereby it was, *inter alia*, ' made lawful for any constituent member of a meeting for election, who shall apprehend any wrong to have been done by the majority of such meeting, to apply to the Court of Session by summary complaint, for rectifying such abuse, or making void the election, so as such complaint be presented to the said Court within two calendar months after the annual election of magistrates and counsellors.'

In a late case, Young and others of Anstruther-Easter, having allowed the two calendar months to elapse, were cut out of their remedy of summary complaint upon the statute; but they brought an action at *common law* for voiding the election. Proofs were adduced of the bribery and corruption. The pursuers prevailed in this Court, and the election was voided.

An appeal, however, having been taken against this decree, the chief reason urged for a reversal, and for the first time stated from the bar of the House of Peers, not having been before attended to, was, That the Court had given judgment in an action which appeared incompetent, the statute having limited the time, and pointed out the only mode for obtaining redress, which had been neglected..

The *answer* made was, That the statute only authorized a new mode of action for redress of wrongs at annual elections, but that these wrongs were still actionable at common law; and that the remedies *ab ante* competent, could not be meant to be taken away by the statute: That where a statute only allowed a particular and new mode of redress, in a case which was before remediable at common law, the common-law remedy still remained entire.

Replied, That the intendment of the legislature was to take into consideration all the election laws, and by that statute, so full and particular, to cut off at once, and put an end to all questions and disputes that might have arisen upon these laws.

The House of Lords reversed the decree of the Court of Session.

The reasoning in that case appears extremely applicable to the present ; and indeed, *a fortiori* applies, as the antecedent right here was at best disputable and uncertain. The statute of Queen Anne considered fully, and included, all the prior pretences of authors to copy-right, and settled this kind of property on a clear, equitable, and solid footing. It says, as clearly as words can express, That they shall have a right for a certain term of years, *and no longer*.

Though authors, and those in their right, should be supposed to have had a perpetual property in their books ; yet there was no iniquity in rendering it temporary by this act, by which their right is protected by forfeitures and penalties for a considerable tract of time, during which, if their books are good for any thing, they will draw much more than suffices to reimburse and recompense them. Many natural rights are restrained by statute ; such as, the exportation of wool, grain, &c. at certain times. If the proprietors of these goods were allowed to go to any market they pleased, their gains would often be much greater.

The last clause of the act declares, That if the author shall happen to be alive at the expiry of the term of fourteen years, the sole right of printing and disposing, &c. shall return to him for another term of fourteen years ; not the *penalties*, but the *right*, or what is called the *property* ; and not to the bookseller, but to the *author* himself, if he be alive. What possible use was there for this clause, or what purpose could it serve, if, independent of the act, the exclusive right returned to the author, not for fourteen years only, but for ever ? And how could the right return to the author, if he had already given it away for ever to an assignee ? A more unmeaning, nay, more improper clause, cannot be figured, if the pursuers are well founded in their argument.

It is said, That the purpose of the act of Queen Anne was to give an additional security to authors, by means of penalties upon transgression ; and that the reason of limiting this penal sanction to a certain term of years, was, that the chief temptation to invade the property of authors was when the demand was great, which generally lasted only a few years.

But, with submission, this is by no means a natural or reasonable construction of the statute. No similar instance will be pointed

pointed out, of a property being guarded with penalties for a certain number of years only, and left unguarded after that period. If a common-law property is at all allowed to authors in their works, this property is as strong and as entire the *fifteenth* year as it is the *fourteenth*, and the demand may be as great. It is impossible to conceive, that so trivial a circumstance, as the difference of demand between the fifteenth and the fourteenth year after the publication of a book, would be thought sufficient by the legislature to make so important a distinction between these two periods. Besides, independent of penalties, which by this statute are not given at all to the author, but to the informer and to the King, the author's right is made to continue fourteen years longer, in the case of publications after the act, if the author himself be alive; so that the penal consequences in this case expire in fourteen years, and the prorogated right of the author, unattended with any penalties, in twenty-eight years, which surely must suppose, that he has not a right in him which lasts for ever.

Most articles of moveable property are more valuable when new than when old; yet it never was thought necessary to make a law for securing more effectually the owner's right to new furniture, or new property of any kind, leaving the old to shift for itself. No act of parliament ever declared, That a man should have the sole exclusive right to dispose of his goods for fourteen or twenty-eight years *and no longer*; and that whoever invaded this property during that time, should be liable in penalties and punishment. So far from securing the property, this would rather look like an invitation to invade it at the end of the term assigned. If by common law a man had a perpetual right or privilege to do a certain thing, it would surely appear very singular, were he to apply for, and obtain an act of parliament, declaring his right to do that thing for fourteen years *and no longer*. Any person who acted in this manner, would be considered as waving his right at common law.

It was said, There are many instances of penalties superadded, as in the cases of treason, bribery in elections, &c. But will an instance be shown of any statute which says, that treason shall be punishable for fourteen years, *and no longer*; or, that bribery shall be a crime for fourteen years only, and punishable during

that term ; or, that elections shall be free and uncorrupt for fourteen years, *and no longer* ?

In short, this statute cannot be explained upon the footing of a superadded penalty. The clear and plain construction of it is, That it is a standing universal patent, giving authors an exclusive right in their works, or what is called a *statutory property*, for a certain time. It was intended not to give an additional security, but a new benefit to authors, and to free them from the charge and trouble of procuring patents from the Crown.

The act therefore, (so far, at least, as applicable to Scotland), appears to be neither accumulative nor restrictive of any former right, but rather creative of a full clear one, for a determinate time, and under certain conditions : And the reason of guarding it with penalties seems to have been, that this was the best manner of securing the right introduced by the statute, as the liquidation of damages must often be extremely difficult. An act of this kind was fully sufficient for all the purposes of rewarding authors, and encouraging learning ; whereas the establishing an independent inextinguishable property in copies, would be pernicious and destructive.

The clause in the act, which provides, ‘ That it do not extend either to prejudice or confirm any right that the said Universities, or any of them, or any person or persons have, or claim to have, to the printing or reprinting any book, or copy already printed, or hereafter to be printed,’ has been appealed to by some, as containing a general salvo of all antecedent rights ; and consequently of the common-law right of authors. But the smallest consideration will show, that this clause could only have in view those special rights, founded upon statute, charter, or other privilege, which either the Universities or particular persons may have a claim to ; rights not merely natural, but founded on privilege. It is obvious, that if the words of this proviso are interpreted to mean any more than a salvo of special rights, such as the claims of King’s printers, patentees, and Universities, they must operate a repeal of all the preceding clauses.

By the words ‘ said Universities,’ are meant Oxford and Cambridge, who, before this act, had the privilege, by patent, of printing several books, such as Bibles, Acts of Parliament, &c. Basker, who was King’s Printer, disputed this right with them. The Stationers Company likewise had, or claimed, the sole right

of printing different books, particularly Almanacks, Psalms, Psalters, &c. Partridge disputed this, and insisted to print an Almanack of his own compiling. They likewise pretended a right to law books; but Atkins, a law-patentee, got an injunction against every member of the Company, for printing Roll's Abridgment. Roper, who purchased Croke's Reports, printed the book without the consent of the law-patentees, upon which they in 1705 raised an action against him. In like manner these law patentees disputed with Viner the right to print his abridgment though compiled by himself. Other instances might be given; and as several of these disputes were subsisting at the time the act of Queen Anne was in agitation, it was proper to throw in a provision to leave the question as to these patent-rights entire, whether regarding works already printed, or hereafter to be printed; for even authors, who might afterwards write on particular subjects, might possibly be debarred from printing their own works, as happened in the case of Viner, Partridge, &c. which whether just or not was left undetermined. The same thing was done in the licensing act 1662, and in the act of James II. against monopolies.

Before leaving the act of Queen Anne, it may be observed, That the London booksellers, not satisfied with the advantages which they had thereby obtained, did, in 1734, make a new application to Parliament, for leave to bring in a bill for making more effectual the act of Queen Anne, and for preventing the surreptitious printing or importation of books from foreign parts. It is probable, the chief object in view was to prevent importation from Ireland, as it had long been, and indeed still is a practice, to reprint every English book of any consequence in Ireland, immediately after being published in England, and to undersell the English edition. Had any such thing as a common-law property been understood to be in authors, or the booksellers to whom their copies were assigned, this abuse might surely have been redressed, by applying to the Courts of Ireland. But no such attempt appears ever to have been made; which at least shows, that there is no remedy at common law in Ireland; though, if the defenders are not mistaken, the common law of Ireland is, in other respects, the same with that of England.

Swift, in some of his letters, complains, That even his manuscripts were stole from him there, and published without his consent,

sent, and that he could have no redress. Thus he writes to Mr. Mar. 8, Pulteney, ' You will hear, perhaps, that one Faulkner hath ^{1734.} Vol. 3. printed four volumes, which are called my works. He hath No 381. only prefixed the first letters of my name. It was done utter-
 ' ly against my will; for *there is no property in printers or booksel-*
 ' *lers here, and I was not able to hinder it.* I did imagine, that,
 ' after my death, the several London booksellers would *agree a-*
 ' *mong themselves to print what each of them had, by common*
 ' *consent; but the man here hath prevented it, much to my*
 ' *vexation; for I would as willingly have it done even in Scot-*
 ' *land. All this has vexed me not a little, as done in so ob-*
 ' *scure a place. I have never yet looked into them, nor I be-*
 ' *lieve ever shall.*' He seems here to have had in view the tem-
 ' *porary property which in England was vested in authors by the*
 ' *act of Queen Anne, but which did not extend to Ireland; and*
 ' *he had no notion of a property at common law.*' See also his

Vol. 3. letter to Mr. Pulteney, 12th May 1735, on the same subject; No 382. where he says, ' I never got a farthing by any thing I writ, ex-
 ' cept one, about eight years ago; and that was by Mr. Pope's
 ' prudent management for me.' And he adds, ' *Here the prin-*
 ' *ters and booksellers have no property in their copies.*'

The same observation holds as to the American colonies, where the works of English authors are every day republished openly and avowedly, without any leave from the London booksellers.

The application made in 1734, appears to have been attended with no effect: But, in 1735, and 1736, the London booksellers made another effort; and particularly in 1736, upon a motion made in their behalf, a bill was allowed to be brought in, ' for Journals, Vol. 22. P. 741. the better encouragement of learning, by the more effectual securing the copies of printed books to the authors or purchas-
 ' ers, during the times therein to be mentioned, and to *repeal an*
 ' *act, passed in the eighth year of the reign of her late Majesty,*
 ' *entitled,' &c.*

This bill had probably been in agitation the year before, as a letter appears from Mr. Pulteney to Dr. Swift, of date 29th Swift's April 1735, in these words: ' I have sent you the copy of a bill letters, Vol. 3. No. 346. now depending in our House, for the encouragement of learning, (as the title bears;) but I think, *it is rather of ad-*
 ' *vantage to booksellers, than authors.* Whether it will pass or not
 ' this

‘ this session, I cannot say ; but if it should not, I should be glad of your thoughts upon it, against another session. It seems to me to be extremely imperfect at present. I hope you have many more writings to oblige the world with, than those which have been so scandalously stolen from you ; and when a bill of this nature passes in England, (as I hope it will next year), you may then secure the property to any friend, or any charitable use you think fit.’ This plainly shows Mr. Pulteney’s opinion, That, unless upon the footing of statute, there was no such thing as a property in authors.

This bill was likewise thrown out, and the scheme of repealing the act of Queen Anne appears to have been dropt. But, in 1739, a new act was passed, not materially altering the act of Queen Anne, but establishing two points in favour of the booksellers. It is intitled, ‘ An act for prohibiting the importation of books reprinted abroad, and first composed, or written, and printed in Great Britain ; and for repealing so much of an act, made in the eighth year of the reign of her late Majesty Queen Anne, as impowers the limiting the prices of books.’ The first part of this act subjects the importers to certain penalties, and must have been chiefly intended against the interference of Irish booksellers, as already observed. At the same time, it contains this material proviso, That the act ‘ shall not extend to any book that has not been printed or reprinted in this kingdom, within twenty years before the same shall be imported.’ Which shows, that the legislature still had in view, to debar all *perpetual* exclusive privileges, and to prevent the possibility of authors or booksellers suppressing useful books.

IV. The defenders can pretend to no knowledge in the common law of England ; but they may without offence state what appears from books, and they have already had occasion to observe in what manner printing was originally exercised in England as well as in Scotland.

After exclusive privileges came in use, we find much light thrown upon the subject, by those very grants of exclusion, many of which are of such a nature, and are expressed in such terms, as show an universal opinion, that there was no literary property at common-law in England.

A great number of patents to authors and printers are to be

found in Rymer's *Fœdera*, some few of which shall be here noticed.

By letters patent, dated 12th March 1563, Elizabeth, 'in consideration, that Thomas Cooper of Oxford, hath diverse and sundry times heretofore travailed in the correcting and augmenting of the English Dictionary (commonly called *Bibliotheca Eliota*) and now of late as well to his further pains, &c. hath altered and brought the same into a more perfect form in the following notable work, called *Thesaurus Linguae Latineæ*.' Therefore, 'grants privilege and license to the said Thomas Cooper and his assignies, to print and set forth to sale the said English Dictionary (before named *Bibliotheca Eliota*), and now in this last edition, intituled, *Thesaurus Utriusque Linguae Latinæ et Britannicæ*, and prohibits all others from printing and selling the same, either by the copy heretofore imprinted, or hereafter to be printed by the said Thomas Cooper,' during the space of 12 years. This prohibition seems to extend even to the author of the original work and his heirs, who are debarred from republishing it during the term of the privilege.

26th April 1626, a license in favour of Joseph Webb, sets forth, 'That John Webb, by his petition, has represented that he has attained to a more exact, sufficient, and useful way of teaching to write and speak the tongues than has hitherto been communicated.'—Therefore grants to him, his deputes, substitutes and assignies for 14 years, 'to have the whole teaching of all such as desire the same in the tongues and languages by the way and means by him invented. And the sole privilege of printing and vending all and every book and books whatsoever, which now are or hereafter shall be invented by him, or by him made serviceable to the purpose aforesaid, for the term of 31 years.' And prohibits all others from attempting to teach by the method invented by the said John Webb, or to transport out of the kingdom any of the foresaid books, or to reprint the same within the kingdom;—yielding and paying to his Majesty for the said privilege, *one fifth of the clear benefit* accrescing thereby, and that yearly, at the feast of the annunciation for the whole foresaid term, (the first three years being free) with L. 10 penalty, if not paid within sixty days thereafter.

9th March 1626, Caleb Morely obtained a similar privilege for 21 years, of printing and vending every book and books which now are, or hereafter shall be *invented by him*, or by him made serviceable to the purpose therein mentioned, (viz. a method invented by him for the firm and infallible help of memory, and grounding of scholars in several languages, but chiefly in the Latin and English tongues) as also, all such tables, modules and works whatsoever, which may any way further his said good intention.

4th July 1635, a patent is given to Francis Holyoak for the sole printing a book compiled by him, called *Dictionarium Etymologicum Latinum*, for 14 years. The preamble bears, that his majesty, ' being willing to encourage his subjects in all lawful and commendable studies and endeavours, by appropriating unto them for some term of years, the benefit and fruits of their labours,' therefore grants, &c. A clause is thrown in at the end to this effect; That if at any time during the said 14 years, it should appear to his Majesty or the Privy Council, ' that the grant is contrary to the laws, or in any sort inconvenient to the state of the realm,' then, upon signification thereof by his Majesty, under the signet or privy seal, or by the Privy Council, or any six of them under their hands, that the same is illegal or inconvenient, these letters patent shall forthwith cease.

18th August 1635, a similar privilege is given to William Braithwaite for the sole privilege of printing, according to the method devised by him, any book, poem, or lesson, for the more easy teaching of music, and the furtherance of poetry, oratory, and pronunciation of the Greek and Latin tongues for 21 years. This grant has the same clause in the preamble, and contains the same proviso, as the immediately preceding one.

From these it appears what was the inductive cause of granting such privileges, viz. ' to encourage the subjects in all lawful and commendable studies, by appropriating unto them, for some term of years, the benefits and fruits of their labours.' In some other instances, these special grants and ordinances are expressly mentioned, as being the only foundation of the rights of authors and publishers; for example, a proclamation against the disorderly printing and disposing of books, pamphlets, &c. 25th September, 1623, narrates a decree of the Star-Chamber, anno 1586, and ' that the true intent and meaning of the said decree has

‘ has been cautiously eluded, by printing beyond sea and elsewhere, as well sundry seditious books, &c. as also such allowed books, works, and writings, as have been imprinted within the realm by such, to whom the sole printing thereof by letters patent or lawful ordinance or authority doth appertain, according to the true intent of the said decree, and by importing the same into this our realm.’ And a proclamation 15th April 1636, concerning the book, intitled *Mare Clausum*, is expressed in similar terms.

The great numbers of those patents, which are to be found from the reign of Queen Elizabeth downwards, are another strong proof of the sense of authors, that they had no exclusive power at common law over their works after publication.

It appears too from some of the patents already cited, that it was a matter of doubt, whether the granting such privileges even for a limited time was not contrary to the rights of the subject, and mischievous to the state.

In some cases, so little were literary compositions considered to be the property of the authors, that, those who obtained exclusive grants, were burdened with the payment of an annual sum to the King.

To these observations may be added, that the Universities of Cambridge and Oxford obtained grants, from time to time, for printing and vending all books whatsoever, without taking any notice of the rights of authors *.

We do not find that Shakespear or Ben Johnson, though their works were valuable, ever dreamed of having any exclusive right in them. Various editions of their plays came forth in their own time, not published by them, but by the prompters of the different places of exhibition.

Ja. I. of England made a translation of David’s Psalms. This work was published by order of his son Ch. I. who claimed no property in the book, but gave it the protection of a patent. His words are, ‘ whereof our late dear father was author ;’ and he says, he has ordered it to be perused, ‘ and, being found to be truely and exactly done, we do hereby authorise the same to be imprinted according to the patent granted thereupon.’ The

* See patent in favour of the University of Cambridge, 20th July 1534, and patent in favour of the University of Oxford, 12th November 1632.

edition was printed at Oxford ' by William Turner, printer to the ' famous University, 1631.'

Swift's Letters, above noticed, show, That he never understood himself to be proprietor of the works published by him. Mr. Pope's opinion too appears from the sale of his Homer, in 1712. The conveyance granted by him, was ' of the copy-right ' for fourteen years certain, or as long after as he is enabled by ' the statute of Queen Anne to do it.'

And that Lord *Bolingbroke* was of the same opinion, may be inferred from his will, which, after setting forth, That he was the author of certain books, or tracts, therein mentioned, some of them already published, others not, adds, ' But I have not assigned to any person or persons whatsoever, the copy, or the liberty of printing or reprinting any of the said books or tracts, or letters. Now I do hereby, as far as by law I can, give and assign to David Mallet of Putney, in the county of Surry, Esquire, the copy and copies of all and each of the before-mentioned books, or tracts, or letters; and the liberty of reprinting the same.'

Rolt, in his *Dictionary of trade and commerce*, second edition, London, 1761, under the word *Book*, defines it to be, ' a work of wit or genius, composed and printed for the public utility; or sometimes only for curiosity and pleasure.' And adds, ' The statute of Queen Anne regulates the property of authors.' Under the word *Privilege*, he says, ' Privilege for the impression of books is properly exclusive, being a permission which an author or bookseller obtains under a Prince's seal, to have alone the impression of a book, with a prohibition of all others to print, sell, or distribute the same, within a certain term of years, usually fourteen, under clauses and penalties expressed therein. These privileges were unknown till the beginning of the sixteenth century, when they were introduced in France. The oldest is said to bear date in the 1507, and to have been occasioned by some printers counterfeiting the works of authors as soon as they appeared. But people were yet at liberty to take them, or let them alone, at pleasure, till the interests of religion and the state occasioned the restraining of this liberty. In 1563, Charles IX, published a celebrated ordinance, forbidding any person, on pain of confiscation of

Swift's letters by Hawkesworth, vol. 3. let. 379.

‘ body and goods, to print any letter, speech, &c. without permission. The like has been since done in England; though at present, privileges are not only seldom required, but, by the late act for securing the properties of books, seem needless.’

Several other writers of note have declared against literary property, so far as claimed independent of the statute. The author of a Letter to a member of Parliament, printed in 1747, seems to have been the first who entered the lists on the other side. This letter has been ascribed to an author of reputation, and of high rank in the Church, but probably by mistake; as the person here meant had so little faith in the doctrine of common-law property, that when he published the works of Mr. Pope, with his own notes and commentaries, he applied for and obtained from his late Majesty a patent for a term of years, prefixed to the edition 1764 of the said work *.

From this patent, containing no penalties, but simply a grant of exclusive property for a term of years, and from a note against monopolies, Vol. iv. p. 276. of the 8vo edition, 1760, it may be inferred what the learned editor’s opinion was on the subject of literary property. Yet the anonymous letter imputed to him has been much founded on by the pursuer in this cause; and appears to have been adopted by *Postlethwhayt* in the last edition of his book, published in 1766, where he has been prevailed on by his bookseller to insert it *verbatim*, under the article *Book*; though his own remarks show, that he does not think the property of authors is yet sufficiently established. For he says, ‘ Though what this learned gentleman has urged is more than sufficient to show the justice of a law for the security of literary property; yet we shall presume to add a word more, by observing what effect this would have on particulars, and on the public.’—The reasons offered by him for making such a law,

* It bears, That “ being desirous of reaping the fruits of his labour, which he cannot enjoy without our royal licence and protection, he hath therefore most humbly besought Us to grant him our royal privilege and license, for the sole printing, publishing, and vending the said works, for the term of fourteen years: We being graciously pleased to gratify him in his said request, do by these presents, agreeable to the statute in that behalf made and provided, for Us, our heirs and successors, give and grant, &c.

which

which he says is still wanted here, are somewhat extraordinary : In the *first* place, That it would tend to make books *cheaper* ; and, *secondly*, That the licentiousness of libelling the government, and insulting the church, and gospel itself, by impious books, would be *easier remedied*, than when property is insecure. Under the word *Patent*, he says, ‘ Nothing is more insecure in ‘ this nation than literary property.’

Savary, from whom this work is borrowed, says, ‘ *Privilege pour l'impression des livres.* Ce privilege est proprement exclusif ; ‘ c'est une permission qu'un *auteur*, ou un libraire, obtient au grand ‘ sceau, pour avoir seul la permission d'imprimer un livre, avec ‘ defenses a tous autres de l'imprimer, vendre, & debiter, pen- ‘ dant un certain nombre d'annees, avec les clauses et sous les peins ‘ qui y sont exprimees.’

Mr. Blackstone has been appealed to as an authority of weight B. II. c. 26. § 8. in favour of literary property. But when the passage in his book is considered, it would rather seem that he is doubtful in his opinion. He admits, that a work may be tacitly given to the public, when the author permits it to be published without any reserve of right, and without stamping on it any mark of ownership. And he adds, ‘ *Neither with us in England, hath there been any direct determination upon the right of authors at the common law.* But much may be gathered from the frequent injunctions of the Court of Chancery, prohibiting the invasion of this property; especially where either the injunctions have been perpetual, or have related to unpublished manuscripts, or to such ancient books as were not within the provisions of the statute of Queen Anne. Much may also be collected from the several legislative recognitions of copy-rights; and from those adjudged cases at common law, wherein the Crown hath been considered as invested with certain prerogative copy-rights: For if the Crown is capable of an exclusive right in any one book, the subject seems also capable of having the same right in another.’

Here your Lordships see it expressly admitted, That when this very learned author wrote, which was within these few years, there never had been any direct determination in England upon the right of authors at common law; and indeed the

fact

fact is certain, that till the case of Millar against Taylor was adjudged very lately in the Court of King's Bench, the point was entire as to any *judicial determination*. The circumstances of that case will in the sequel be explained. In the mean time, as Mr. Blackstone says, that much may be gathered from the injunctions in Chancery, it may be proper to inquire into these.

Injunctions. With regard to injunctions, in the *first* place, it may in general be observed, That injunctions of the Court of Chancery are no evidence of a common-law right. They are every day granted in cases where there is no remedy at common law. A variety of instances of this kind will be found in the *Equity Cases abridged*. *2dly*, These injunctions often pass of course, upon a bill being filed, without any answers from the defendant. They are something of the nature of a *fist* upon a *bill of suspension* in Scotland.

The defenders are informed, that the Court of Chancery has never yet avowedly proceeded in its injunctions touching literary composition, upon the principle of an inherent property, antecedent to the act of Parliament, and independent of special privilege.

The only injunctions which appear *prior* to the act, are; 15th November 1681, *Stationers Company v. Lee*, for printing almanacks; 17th November 1681, *Stationers v. Wright*, for the same; 9th and 22d February 1709, *Stationers v. Partridge*, for selling almanacks. These were all upon patent-rights, and therefore have nothing to do with the present question.

The injunctions *since* the act, may be subdivided into three classes. *1st*. Injunctions upon the right given by statute. Of this kind are the two cases, in which Mr. Blackstone says, the injunctions were perpetual: *viz. Knaplock v. Curl*, 9th November 1722; and *Baller v. Watson*, 6th December 1737. And of the same kind, the defenders are informed, were, 28th November 1735, *Motte v. Faulkner*; and 27th January 1736, *Waltho v. Walker*. Injunctions given to enforce the statute, do in no shape apply to the present case. *Viner*, under the title, *Books and Authors*, mentions *Knaplock v. Curl*, and says, that the plaintiff claimed the sole right, &c. *per stat. 8. An.* He takes notice of several other injunctions, but all of them under the statute.

2dly,

2dly, Injunctions to restrain the publication of papers obtained surreptitiously. Of this kind were; 24th May 1732, Webb v. Rose; 5th June 1741, Pope v. Curl; 13th June 1741, Forrester v. Walker; 31st July 1758, Duke of Queensberry v. Shebbeare. In these cases, where manuscripts were clandestinely obtained and printed, the Court of Chancery had no occasion to go on the supposed common-law right of authors, to the perpetual monopoly of their works; for, independent of this question, it was certainly proper to restrain so fraudulent an act as that of publishing an author's manuscript without his consent. Besides, the idea of the Court might be to secure to learned and industrious men, the right given by the statute, and to hinder the piratical printer from robbing the author of a benefit, which, though not actually then vested, might become vested in him for fourteen years, with a contingent term of fourteen more, as soon as he chose to publish.

3dly, Injunctions when the books were old, and the case not within the terms of the statute. This is the only kind of injunction from which any aid can possibly be drawn in favour of literary property. At the same time, when the instances are examined, they will be found to be of no avail. The first is, Eyre v. Walker, for the Whole Duty of Man, 9th June 1735. In this there was only an injunction *till full answer, or further order.* Injunctions of this kind may easily be obtained, as the fact is taken upon the stating of the bill. Nothing further appears to have been done in this case. It never came to a final hearing, so that no conclusion can be drawn from it.

The next is, Tonson v. Walker, for Dr. Newton's Milton, in 1752. From a written note of this case, it appears, that the counsel for the defendant was interrupted by the then Lord Chancellor, who desired to know, whether the life, and preface, and notes, were not within the 8th Anne. On the first hearing, his Lordship sent the book to the Master in Chancery, to see what notes there were of Mr. Merchant's, the piratical editor, and how many of Dr. Newton's. Afterwards his Lordship said, he had been inclined to send a case to the Judges, in order to settle the general question of law; but as Dr. Newton's notes came within the act of Queen Anne, without deciding on the point of

law, Merchant had no right to Dr. Newton's notes ; and he continued the injunction,

The case of *Millar v. Donaldson*, came before the next Lord Chancellor. This was a motion at the first seal after Trinity term, 1765, to continue the injunctions which had been obtained upon a bill without answers, to stay publication of the following books ; *Thomson's Seasons*, claimed by Millar ; *Pope's Iliad*, by Oxburne ; *Swift's Miscellanies* with notes, and the life of the author, by Bathurst. A written note of the case says, it was observed, ' I have seen no case where the terms of the act being expired, the Court has continued the injunction, after answer put in.—If I see a question of law, I only delay the parties by an injunction, when I see that at the hearing I shall send them to law ; for they may go directly to law without the delay of this Court.—But where I see it within the statute, then I should, according to the precedents which I must approve, stay the publication.—In the case of the Stationers Company, the Court went on the right of the letters patent: The Crown was considered as *Pater patriæ*; and it was proper to print the acts of State, and that the Crown should have the power of doing it.—In this case, it is a capital question in law, subtle in its nature, and extensive in its consequences.—It would be presumption in me, to determine a question worthy of the highest consideration of any Court in Westminster-hall ; therefore, I shall say nothing as to the merits :—It might be flattery to ones self, on the one hand, to determine for authors, in order to get fame and popularity from them ; and on the other hand, it would be dangerous to vest the property ; for that contains not only a right to publish, but also to suppress, by which means, those who have a right to the greatest authors, may suppress them, which would be a fatal consequence to the public.—These outlines are so extensive, that I do not care to draw them nearer in so great a question. But as at the hearing I shall send it to law, I think I ought to dissolve the injunction, and leave the parties to proceed at law, in regard to Thomson's Seasons and Pope's Homer's Iliad, which are both out of the act.—Swift's Miscellanies stand on the same footing with Newton's Milton ; for the Life of Swift by Dr. Hawkesworth is new, and within the act.' Accordingly the injunctions were dissolved, except as to *Swift's Miscellanies* ; and this was afterwards dissolved.

Soon after came *Millar v. Taylor*, before the same Lord Chancellor, on motion to dissolve the injunction obtained by the plaintiff, against publishing Thomson's *Seasons*.—The injunction had been granted by Mr. Baron Smyth, who sat on a former occasion for the Lord Chancellor. But at the time of granting the injunction, Mr. Baron Smyth had made a case for the King's Bench.—On the present motion, the Court proceeded on the principles of the former case *v. Donaldson*, and therefore dissolved the injunction.

Another case, of *Millar v. Taylor*, for printing Young's *Night-Thoughts*, came before the master of the rolls, Michaelmas term 1765. The book was manifestly within the 8th Anne, and a perpetual injunction was prayed. A note of the case says, it was observed, That a perpetual injunction might be improper, as it seemed to imply perpetual right. 'I think the injunction ought 'to be continued, but it ought to be so framed, as not to 'im- 'ply a right beyond the two terms of fourteen years.'

The next case in Chancery known to the defenders was, *Macklin v. Richardson*, which came before the late Lord Chancellor, Trinity term 1768, relative to an injunction granted to stay the publication of *Love A-la-mode*, a farce written by Macklin.—The defendant had employed one Gurney, a short-hand writer, to attend the performance at the play-house, and had the copy of him for one guinea. The first act was printed in a magazine, and the second act was promised in a subsequent number. Macklin had never printed his farce, or transferred the copy-right. It appears, from a written note of the case, that after hearing counsel for the plaintiff, the Court desired to know, Whether the question of law was decided. 'Before he 'moved a step, he desired to know the ground.' The cause therefore was ordered to stand over till the general question of property should be determined. The defenders are informed, that Richardson has since been condemned in one shilling damages.

It is said, That the London booksellers have all along been afraid of bringing the matter to a solemn trial at law, though much industry has been used in applying for injunctions in the Court of Chancery; and that more than once they have attempted to accomplish their purpose, by a collusive trial. Thus it is informed,

informed, that in 1758, a suit was commenced by them in the Court of Chancery, against one Collins of Salisbury, for vending copies of the *Spectator* printed in Scotland. Collins had by this time become deeply concerned in copy-right, in conjunction with the London booksellers, so that it was very much his interest to lose the cause; because the advantage that would accrue to him from perpetuating the exclusive right, would far overbalance any trifling damages to which he could be subjected for selling Scotch *Spectators*, supposing it had been understood or intended that he should pay. Collins's defence, therefore, it will be readily believed, was not managed with the greatest accuracy; but the Court, upon hearing the case, being sensible of its importance, and perhaps suspecting what was at bottom, referred the matter to the twelve Judges, and it has lain over ever since.

Thus matters stood, when, in consequence of the above proceedings in Chancery, in the cases of *Millar v. Donaldson*, and *v. Taylor*, the plaintiff Millar at last brought his trial before the Court of King's Bench. The particulars of the trial are said to have been these.

The subject in dispute was Thomson's *Seasons*, a book first published in 1727. The monopoly of twenty-eight years expired in 1755. After that period, many editions of it were printed openly, with the names of the publishers affixed to the title-page, without any challenge from Millar, (who had purchased the copy-right from the author,) till 1763, when an injunction was obtained in Chancery against Donaldson, and another against Taylor, to stop the sale of an edition printed by Donaldson; which injunctions, however, were afterwards in 1765 dissolved upon answers, as already said. Millar proceeded no farther in his suit with Donaldson, but went on with Taylor, whom he seems to have thought a fitter person to be dealt with, in case at any time a compromise should be needful. It may be observed, that Taylor had not printed the *Seasons*, but only sold some of Donaldson's impression.

The injunction having been dissolved in the Court of Chancery, and the parties left to try the matter at common law, this of itself is proof positive, that hitherto the point was undetermined; and it is likewise proof, that the Court of Chancery considered it as a common-law question, which did not fall to be determined

terminated upon suggestions of equity in the Court of Chancery, but necessarily required the decision of the courts of law.

The trial having proceeded in the Court of King's Bench, the jury returned a verdict, finding the fact of publication ; and the Court afterwards gave judgment in favour of the plaintiff, but not without contrariety of opinion.

The defendant at first took out a writ of error against the determination. Afterwards, however, it is informed, he was prevailed on to compromise matters with the booksellers, who, it is said, paid all his expences. Accordingly, he withdrew his writ of error.

A judgment of the Court of King's Bench, establishing a point of the common law of England, not formerly decided, is undoubtedly of the highest authority in that country ; but it cannot be admitted as conclusive of the present question, which must necessarily be tried by the law of Scotland*.

The legislative recognitions, mentioned by Mr. Blackstone, when looked into, are foreign to the purpose. The licensing act, 13th Charles II. *cap. 33.* has already been spoke to. The act, 10th Q. Anne, *cap. 19.* § 112. only acknowledges that sort of property, which was vested by the act 8th of Q. Anne ; and the act 5th of his present Majesty, *cap. 12.* § 26. relates to selling pamphlets and news-papers without the author or publisher's name.

The only other thing, founded on, is the Crown's prerogative copy-right to certain books, such as Bibles and Acts of Parliament, which has already been explained, and has no connection with the present question.

These observations on the law of England are submitted with the greatest diffidence ; and the defenders shall only add upon this head, that, if the law of England stands in favour of literary property, it is different from the law of Scotland, or of other countries. In France, *patents* are given to authors and booksellers from ten to twenty years. And it appears that the great Colbert was of opinion, that even these gave too much Colbert's political Testament.

* It is informed, that another injunction was lately moved for in the Court of Chancery, against Mr. Donaldson, for printing Thomson's Seasons ; and that the same was granted without any hearing on the merits, as it was understood in the Court, that Mr. Donaldson was to bring the question by appeal before the House of Lords, which he is accordingly preparing to do.

opportunity to the stationers of Paris to oppress the booksellers in other parts of the kingdom, whereby books were kept at an exorbitant price. It is believed, in Holland and in Germany, daily instances occur of temporary exclusive privileges to authors. Many of them are to be seen prefixed to their books. But it will not be pretended, that there is any such thing there, as that which is now termed in England, *a literary property at common law.*

V. Circumstances of the present case. V. The defenders shall not bestow many words on the special

circumstances of this case, which plainly show, that the purser, and those in whose right he pretends to have come, had originally no view to a claim of property at common law, or to anything further than a temporary right by patent in the work now in question. The reverend author seems at first to have meant, that this work should be abandoned to the public, as it is believed, he did not so much as enter it in Stationers Hall; but afterwards, having been told by his bookseller, that something might be made of reprinting it under an exclusive patent for a certain number of years, he assigned his right with that view, and a patent was obtained.

This patent, unguarded by penalties, and merely giving an exclusive right for the term of fourteen years, was clearly of no use, if such right was antecedently in him not for fourteen years only, but for ever. If he could convey his property at common law, and if this conveyance would have been a sufficient ground of action to the assignee against every violator of it, what higher right, what greater benefit, did the patent confer upon him? what better action could he maintain upon the patent, than upon his common law-property?

When Mr. Austin published the work with his patent prefixed, did he not hold forth to the world, that he had an exclusive right of printing this book for fourteen years, and for that term only? and did he not in effect acknowledge and declare, that, the term of the patent being elapsed, every other person might print and publish the work at pleasure? If his present plea be good, he laid a snare for the lieges by founding only on his patent, which ought to bar him from the present action.

Neither was his conduct justifiable, in allowing the intended new edition to be advertised for two years and a half in all the news-

newspapers without any challenge, and then bringing the present action upon titles scarce connected even with the assignee of the author, in order that he might run away with the profits, without being at the expence or trouble of the publication.

It may be added, that as the pursuer is a foreigner with respect to Scotland, and as this book of which he claims the property is the work of a foreigner, the question is to be considered entirely in the same light, as if the action were brought at the instance of a *French* bookseller, complaining of the defenders for having republished in Scotland a book, which had been originally printed in France; and how far such an action ought to be sustained, even though the general doctrine of literary property were established, may admit of considerable doubt.

The London booksellers themselves, have never understood, that the property of foreign authors extended to England, or that Voltaire, and other French writers of the first note, whose works are daily reprinted in England without leave asked or given, would have any right to sue the English publisher, upon the common law of England. It would not be convenient to carry the doctrine so far; and yet it does not occur what better right an English bookseller can have to come to Scotland, and there to maintain, that his property is invaded by a person who has done nothing more than exercised his business of a printer within Scotland, and who neither has encroached upon the right of any of the leiges of this country, nor can be accused of any violation of the common law of England having never set his foot in that kingdom, nor subjected himself to its laws.

The present question can never be tried upon the common law of England, for the defenders are not bound to know any thing of that law, or to regulate their conduct by it in any shape. The pursuer must be able to say that, he has a property in this work by the common law of *Scotland*, which property happening to be accidentally in this country, has been unjustly seized by these defenders, whom he sues before your Lordships, as the proper jurisdiction in order to obtain restitution from them. But upon what footing is it that the common law of Scotland can regulate the property of foreign authors with regard to works composed and published in another country? This would be giving it an effect beyond what the common law of England is allowed to have; and the consequences of extending

ing it so far would be highly inexpedient; as at this rate, we could not print a single foreign book in Scotland, and we would be at the mercy of the booksellers of other countries for every work not originally published in Scotland, so that the learning of this country would soon come within a very narrow compass.

It is submitted, that these circumstances ought to have weight in aid of the general argument; and upon the whole, the defenders, with humble confidence, expect to be absolved from this action.

In respect whereof, &c.

ILAY CAMPBELL.

Anno Octavo ANNÆ REGINÆ.

An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.

WHEREAS printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published books, and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: For preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books; may it please your Majesty, that it may be enacted, and be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, That from and after the tenth day of April, One thousand seven hundred and ten, the author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of *one and twenty years*, to commence from the said tenth day of April, and no longer: And that the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assigns shall have the sole liberty of printing and reprinting such book and books for the term of *fourteen years*, to commence from the day of the first publishing the same, and no longer: And that if any other bookseller, printer, or other person whatsoever, from and after the tenth day of April, One thousand seven hundred and ten, within the times granted and limited by this act, as aforesaid, shall print, reprint, or import, or cause to be printed, reprinted, or imported, any such book or books, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed in

the presence of two or more credible witnesses, or knowing the same to be so printed or reprinted, without the consent of the proprietors, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such book or books, without such consent first had and obtained, as aforesaid, Then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets, being part of such book or books, to the proprietor or the proprietors of the copy thereof, who shall forthwith damask and make waste paper of them: And further, That every such offender or offenders shall forfeit one penny for every sheet which shall be found in his, her, or their custody, either printed or printing, published or exposed to sale, contrary to the true intent and meaning of this act, the one moiety thereof to the Queen's most excellent Majesty, her heirs and successors, and the other moiety thereof to any person or persons that shall sue for the same, to be recovered in any of her Majesty's Courts of Record at Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoign, privilege, or protection, or more than one imparlance shall be allowed.

And whereas many persons may through ignorance offend against this act, unless some provision be made, whereby the property of every such book, as is intended by this act to be secured to the proprietor or proprietors thereof, may be ascertained, as likewise the consent of such proprietor or proprietors for the printing or reprinting of such book or books may from time to time be known: Be it therefore further enacted by the authority aforesaid, That nothing in this act contained shall be construed to extend to subject any bookseller, printer, or other person whatsoever, to the forfeitures or penalties therein mentioned; for or by reason of the printing or reprinting of any book or books without such consent as aforesaid, unless the title to the copy, or such book or books hereafter published, shall, before such publication, be entered in the register-book of the Company of Stationers, in such manner as hath been usual; which register-book shall at all times be kept at the Hall of the said Company; and unless such consent of the proprietor or proprietors be in like manner entered, as aforesaid; for every of which several entries sixpence shall be paid, and no more; which said register-book may, at all seasonable and convenient times, be resorted to, and inspected by any bookseller, printer, or other person, for the purposes before mentioned, without any fee or reward;

and

and the clerk of the said Company of Stationers shall, when and as often as thereunto required, give a certificate under his hand of such entry or entries, and for every such certificate may take a fee not exceeding sixpence.

Provided nevertheless, That if the clerk of the said Company of Stationers for the time being, shall refuse or neglect to register or make such entry or entries, or to give such certificate, being thereunto required by the author or proprietor of such copy or copies, in the presence of two or more credible witnesses, That then such person and persons so refusing, notice being first duly given of such refusal, by an advertisement in the Gazette, shall have the like benefit as if such entry or entries, certificate or certificates, had been duly made and given ; and that the clerks so refusing, shall, for any such offence, forfeit to the proprietor of such copy or copies the sum of twenty pounds, to be recovered in any of her Majesty's Courts of Record at Westminster, by action of debt, bill, plaint, or information, in which no wager of law, escheat, privilege, or protection, or more than one imparlance shall be allowed.

Provided nevertheless, and it is hereby further enacted by the authority aforesaid, That if any bookseller or booksellers, printer or printers, shall, after the said five and twentieth day of March, One thousand seven hundred and ten, set a price upon, or sell, or expose to sale, any book or books at such a price or rate as shall be conceived by any person or persons to be high and unreasonable ; It shall and may be lawful for any person or persons to make complaint thereof to the Lord Archbishop of Canterbury for the time being ; the Lord Chancellor, or Lord Keeper of the Great Seal of Great Britain for the time being ; the Lord Bishop of London for the time being ; the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, the Lord Chief Baron of the Court of Exchequer, for the time being ; the Vice-Chancellors of the two Universities for the time being, in that part of Great Britain called England ; the Lord President of the Sessions for the time being ; the Lord Justice General for the time being ; the Lord Chief Baron of the Exchequer for the time being ; the Rector of the College of Edinburgh for the time being, in that part of Great Britain called Scotland ; who, or any one of them, shall and have hereby full power and authority, from time to time, to send for, summon, or call before him

or

or them such bookseller or booksellers, printer or printers, and to examine and enquire of the reason of the dearness and enhancement of the price or value of such book or books by him or them so sold or exposed to sale; and if upon such enquiry and examination it shall be found, that the price of such book or books is enhanced, or any wise too high or unreasonable, then and in such case the said Archbishop of Canterbury, Lord Chancellor or Lord Keeper, Bishop of London, two Chief Justices, Chief Baron, Vice-Chancellors of the Universities, in that part of Great Britain called England; and the said Lord President of the Sessions, Lord Justice General, Lord Chief Baron, and Rector of the College of Edinburgh, in that part of Great Britain called Scotland, or any one or more of them, so enquiring and examining, have hereby full power and authority to reform and redress the same, and to limit and settle the price of every such printed book and books, from time to time, according to the best of their judgments, and as to them shall seem just and reasonable; and in case of alteration of the rate or price from what was set or demanded by such bookseller or booksellers, printer or printers, to award and order such bookseller and booksellers, printer and printers, to pay all the costs and charges that the person or persons so complaining shall be put unto, by reason of such complaint, and of the causing such rate or price to be so limited and settled; all which shall be done by the said Archbishop of Canterbury, Lord Chancellor or Lord Keeper, Bishop of London, two Chief Justices, Chief Baron, Vice-Chancellors of the two Universities, in that part of Great Britain called England; and the said Lord President of the Sessions, Lord Justice General, Lord Chief Baron, and Rector of the College of Edinburgh, in that part of Great Britain called Scotland, or any one of them, by writing under their hands and seals, and thereof public notice shall be forthwith given by the said bookseller or booksellers, printer or printers, by an advertisement in the Gazette; and if any bookseller or booksellers, printer or printers, shall after such settlement made of the said rate and price, sell, or expose to sale, any book or books at a higher or greater price than what shall have been so limited and settled, as aforesaid, Then and in every such case, such bookseller and booksellers, printer and printers, shall forfeit the sum of five pounds for every such book so by him, her, or them sold or exposed to sale, one moiety thereof to the

Queen's

Queen's most Excellent Majesty, her heirs and successors, and the other moiety to any person or persons that shall sue for the same, to be recovered, with costs of suit, in any of her Majesty's Courts of Record at Westminster, by action of debt, bill, plaint, or information, in which no wager of law, esloign, privilege, or protection, or more than one imparlance shall be allowed.

Provided always, and it is hereby enacted, That nine copies of each book or books, upon the best paper, that from and after the said tenth day of April, One thousand seven hundred and ten, shall be printed and published, as aforesaid, or reprinted and published with additions, shall, by the printer and printers thereof, be delivered to the warehouse-keeper of the said Company of Stationers for the time being, at the Hall of the said Company, before such publication made, for the use of the Royal Library, the Libraries of the Universities of Oxford and Cambridge, the Libraries of the four Universities in Scotland, the Library of Sion College in London, and the Library commonly called the Library belonging to the Faculty of Advocates at Edinburgh, respectively; which said warehouse-keeper is hereby required, within ten days after demand by the keepers of the respective Libraries, or any person or persons by them or any of them authorized to demand the said copy, to deliver the same, for the use of the aforesaid libraries; and if any proprietor, bookseller, or printer, or the said warehouse-keeper of the said Company of Stationers, shall not observe the direction of this act therein, That then he and they, so making default in not delivering the said printed copies, as aforesaid, shall forfeit, besides the value of the said printed copies, the sum of five pounds for every copy not so delivered, as also the value of the printed copy not so delivered, the same to be recovered by the Queen's Majesty, her heirs and successors, and by the Chancellor, Masters, and Scholars of any of the said Universities, and by the President and Fellows of Sion College, and the said Faculty of Advocates at Edinburgh, with their full costs respectively.

Provided always, and be it further enacted, That if any person or persons incur the penalties of this act, in that part of Great Britain called Scotland, they shall be recoverable by any action before the Court of Session there.

Provided, That nothing in this act contained, do extend, or shall be construed to extend, to prohibit the importation, vending or selling of any books in Greek, Latin, or any other foreign language, printed beyond the seas; any thing in this act contained to the contrary notwithstanding.

And be it further enacted by the authority aforesaid, That if any action or suit shall be commenced or brought against any person or persons whatsoever, for doing or causing to be done any thing in pursuance of this act, the defendants in such action may plead the general issue, and give the special matter in evidence; and if upon such action a verdict be given for the defendant, or the plaintiff become nonsuited, or discontinue his action, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant in any case by law hath.

Provided, That nothing in this act contained shall extend, or be construed to extend, either to prejudice or confirm any right that the said Universities, or any of them, or any person or persons have, or claim to have, to the printing or reprinting any book or copy already printed, or hereafter to be printed.

Provided nevertheless, That all actions, suits, bills, indictments, or informations for any offence that shall be committed against this act, shall be brought, sued, and commenced within three months next after such offence committed, or else the same shall be void and of none effect.

Provided always, That after the expiration of the said term of fourteen years, the sole *right* of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of *fourteen years*.

